SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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75-964

IN THE

# Supreme Court of the United States

October Term, 1975

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JAMES STRONG, *et al.*,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

# Supreme Court of the United States

**October Term, 1975**

JAMES STRONG, *et al.*,

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*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Seneca Cayuga Tribe of Oklahoma* respectfully prays that a writ of certiorari issue to review the judgment and the order of the United States Court of Claims entered in this proceeding on May 30, 1975 in respect of which a motion for rehearing was denied by Order of that court dated October 10, 1975. This petition is being filed simultaneously with another petition for review of orders of the Court of Claims of the same date upon similar grounds but related to a later treaty (1817). The issues are identical though the parties to be affected are different by virtue of the differences in use and occupation. It is requested they be read together.

* The Seneca Cayuga Tribe of Oklahoma was the petitioner in Dockets 341C and 341D before the Indian Claims Commission. These Dockets were consolidated for trial with six other Indian tribes who had claimed title to portions of the area involved whose names and docket numbers will be found in the Opinion of the Indian Claims Commission set forth in Appendix B.

## Opinions Below

The Court of Claims entered an Order on May 30, 1975 approving and affirming the decision and Order of the Indian Claims Commission and remanding the case to the Commission for further proceedings. No opinion was rendered other than a recital in the Order that the Findings of Fact made by the Indian Claims Commission could have been fuller and more extensive. Judge Bennett dissented, in part, from the conclusion stated in the Order. The Order and the dissent are reprinted in Appendix A. The Order of October 10, 1975 denying the motion for rehearing is also reprinted in Appendix A.

The opinions and findings of the Indian Claims Commission, 30 Ind. Cl. Comm. 8 and 31 Ind. Cl. Comm. 359, are reprinted in Appendices B and C.

## Jurisdiction

The judgment of the Court of Claims was entered on May 30, 1975. A motion for rehearing was made and an Order denying such motion was made and entered on October 10, 1975. No extensions of time to petition for certiorari were sought. This Court has jurisdiction under 25 U.S.C. §70s(c) and 28 U.S.C. §1255.

## Questions Presented

Where as detailed in the statement of the case: The ancestors and predecessors in interest of the petitioner used and occupied as Indians the area ceded to the United States under the terms of the Treaty of Fort Industry (7 Stat. 87, July 4, 1805) from as early as 1742 until the treaty date

and under which treaty they are described as living with named parties to the treaty and were to receive a portion of the purchase price and for whom the representative of their ancestors separately signed the Treaty of Greeneville (7 Stat. 49, August 3, 1795) in a manner clearly indicating the separate identity of the tribal group on whose behalf he was acting, THE QUESTIONS PRESENTED ARE:

1. Is an Indian tribe separately signing the Treaty of Greeneville (7 Stat. 49), though not named in the preamble and admittedly occupying portions of the lands ceded in the "follow-up" treaty, barred from recovering a portion of a conscionable consideration by reason of the omission of its name from the preamble of the treaty and thus derived no rights thereunder?

2. Is an Indian tribe whose ancestors and predecessors in interest used and occupied for upwards of half a century portions of lands ceded to the United States and a private land company barred from recovering a conscionable consideration under the Indian Claims Commission Act because more than one tribe shared such use and occupancy within the bounds of the particular lands ceded where the only finding by the Indian Claims Commission of such use and occupancy was a single summary one of joint use and occupancy by various tribes including the ancestors of petitioner herein?

3. Is it morally just and equitable and consonant with the "fair and honorable dealing" prescribed within the aims and purposes of the Indian Claims Commission Act to deny compensation to one tribe on the basis of a technical interpretation of a recently stratified legal principle

and award that share of the compensation which might have been awarded to the petitioner, absent such technicality, to other tribes some of whom did not use and occupy the lands in as extensive a manner, both as to time and area?

4. Should not this Court re-examine the purposeful rigidity with which the Indian Claims Commission and the Court of Claims have applied the general principles describing aboriginal title as related to the compensable interests of Indian occupants, which principles were discussed in *United States* v. *Santa Fe* (314 U.S. 339), which rigidity denies to Indians their own right of shared occupancy and confers its economic benefits to others, and in certain cases to the United States, in violation of the express promise made by the United States in 1795?

## Statutes and Treaties

Pertinent provisions of the Treaty of Greeneville of August 3, 1795 (7 Stat. 49) are set forth in Appendix D.

## Statement of the Case

The petitioner, Seneca Cayuga Tribe of Oklahoma, consists of descendants of various Iroquois Indians at one time members of the Six Nations and its constituent tribes* who for many years and up until July 4, 1805, the treaty date, used and occupied lands now in the State of Ohio and which lands were acquired by the United States and a private land company under the terms of the Fort Industry treaty. At

* A confederacy consisting of the Seneca, Cayuga, Mohawk, Onondaga, Oneida and Tuscarora Nations.

various times during the period of occupancy the ancestors of the petitioner were generally referred to as "Mingos", "Senecas", "Senecas of Ohio, Senecas of Sandusky", "Mohawks" and "Six Nations of Sandusky".*

These Indians used and occupied portions of the area from as early as 1742 and continuously up until 1805. The use and occupancy was not exclusive, but was joint and amicable with one or more Indian tribes. The number of joint and amicable users was somewhat dependent upon the time and the then existing conditions but at no time was there evidence of inter-tribal hostility. The contrary was frequently evidenced by joint occupancy of the same villages.

The nature and extent of the use and occupancy by petitioner's predecessors in interest will be found in Appendix E which contains a portion of the proposed findings submitted by petitioner to the Indian Claims Commission.

On August 3, 1795, at Greeneville, the United States entered into a treaty with a group of Indian tribes then belonging to a combination called the Northern Confederacy who were situated in the old Northwest Territory. 7 Stat. 49. Among the signers was one Reyntueco "1 of the Six

* *Strong, et al.* v. *United States*, 31 Ind. Cl. Comm. 89, 156, Court of Claims Appeal 1974, June 25, 1975, *cert. denied* December 1975 (Dkt. 75-389).

> " 'Mingo' is the term usually used to describe certain Iroquois Indians, largely Senecas, who had left the villages of the main Iroquois Confederacy and formed new settlements in Pennsylvania and Ohio. By the time of the Greeneville Treaty in 1795 they were usually referred to as "Senecas of Sandusky." (See, Hodge, Handbook of American Indians (1907), Part I, at 867)."

Nations living at Sandusky". The United States acquired certain lands and "relinquished" to the Indians lands north and west of a line described in the treaty and "explicitly declared that the meaning of that relinquishment is this: The Indian tribes who have a right to these lands are quietly to enjoy them—and the United States will protect all the said Indian tribes in the quiet possession of their lands.—"

Shortly prior to the treaty of Greeneville, The Six Nations, then and now residing in New York, entered into a treaty with the United States on November 7, 1794 at Canandaigua whereby they agreed to confine themselves to a described territory in New York and relinquished all claims to lands west of New York and Pennsylvania. 7 Stat. 44.

At a treaty signed at Fort Industry on July 4, 1805, 7 Stat. 87, the United States approved the sale of Royce Area 53 to the Connecticut Land Company and acquired for itself Royce Area 54 both of which tracts were within the area "recognized by the United States to be the property of the Indians who had a right thereto." The areas ceded under the treaty terms contained approximately 3,000,000 acres and the gross consideration was $32,736.00 of which $18,916.67 was paid by the Connecticut Land Company for the ownership of Area 53. The considerations were to be paid to various tribes including "those of the Shawnee and Seneca nations who reside with the Wyandots."

After a lengthy trial the Commission on April 4, 1973 entered its decision findings and order determining that

five tribes were each entitled to an undenoted one fifth of the recognized title.

The general principle of the Commission's decision is summarized in its opinion as follows:

> —We conclude that those tribes of Indians who participated at the 1795 Treaty of Greeneville and who were then using and occupying Royce Areas 53 and 54 were, by virtue of said treaty, together with the "follow-up" treaty of July 4, 1805, granted recognized title to those areas.—

The Seneca claim was dismissed on the ground that their predecessors in interest "were not signatories to the 1795 Treaty of Greeneville and they did not possess aboriginal title". And by virtue of non exclusive use and occupancy they were foreclosed from any claim based upon aboriginal ownership.

No finding was made by the Indian Claims Commission as to the particulars of the use and occupancy. Only one conclusory general finding (Finding 8, 30 Ind. Cl. Comm. 8, 34, Appendix B) was made reciting the area to be "the scene of joint use and occupancy by several Indian tribes and groups". It states there were reports and documentation of various named Indian tribes and "the picture that emerges was one of small pockets of various tribes interspersed throughout these areas [53 and 54] with conglomerates of these small concentrations along the waterways within the two areas. There were no large regions used and occupied by any particular tribe or group to the exclusion of others".

Judge Bennett, in his dissent, pointed out that the record was large, taking many weeks of hearings, thousands of pages of transcripts and hundreds of exhibits and that the findings did not permit the review required by statute so as to be something other than a "cop out" (Appendix A).

The nature of the use and occupancy, to wit, joint and amicable was not controverted or disputed by the Commission or any of the parties in the consolidated proceedings.

The Commission, in Finding 3, determined that when "Reyntueco" signed the original treaty of Greeneville separately and being described therein as "of the Six Nations living at Sandusky" he did so as a member of a group separately described as "Delawares of Sandusky" and not as a signatory thereto on no discernible positive evidence other than the printed edition of the treaty in Statutes at Large published in 1846 (3 Ind. Cl. Comm. 8, 12, 27), concluding therefrom that "the predecessors in interest of the Seneca Cayuga Tribe of Oklahoma were not signatories to the 1795 Greeneville Treaty and acquired no rights thereunder" (30 Ind. Cl. Comm. 8, 35).*

On a motion for rehearing based upon a photocopy of the original copy of the treaty (31 Ind. Cl. Comm. 359, 370, Appendix C) the Commission, after examination of the photocopy of the original document, delineated all of its features that differed from the printed Statute copy which

* This notion of the identity and affiliation of Reyntueco had never been raised either at the hearings or in the briefs of the parties and was only indirectly suggested by the Commission at an oral argument shortly before rendition of the decision.

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demonstrated the separateness of the signature and of the party described as "of the Six Nations living at Sandusky", and adhered to its original conclusion that the act of signing made him neither signatory nor party and those for whom he purported to act acquired no rights thereunder. The Commission apparently relying for this last conclusion upon the emphasis placed upon the word "said" in the body of the treaty, cited and quoted from *Sac and Fox Tribe* v. *United States*, 161 Ct. Cls. 189, cert. denied 375 U.S. 921 (1963) (Appendix C).

The Court of Claims made no reference in its order of May 30, 1975 and the order of October 10, 1975 to this issue.

## Reasons for Granting the Writ

**1. The holdings of the tribunals below determining that an erroneous editorial composition, made fifty years after the event, of the basic treaty Agreement between the United States and the Indian Tribes living in the Northwest Territory, setting forth the rights and interests of the Indians, to be the controlling basis for determining the parties who are to be the beneficiaries of that treaty are flagrantly wrong.**

The refusal of the Indian Claims Commission to recognize a party, clearly identified as a signer of the Greeneville Treaty, to be a beneficiary of the solemn promise of the United States given as the prime consideration for the cessation of ten years of hostilities is an act of gross injustice. It also typifies the expression "speaking with a forked tongue".

The Greeneville Treaty gathering was not some casual "get together" to which any passerby would be invited to

"come on in and sign this petition" for some political purpose such as zoning. It was a most important diplomatic event and only the representatives of those Indians who were concerned and were to be affected were present. The Six Nations of Sandusky, or Mingos or Senecas were there. The Treaty Journal bears this out. Every signer of the Treaty, including Anthony Wayne signed as a representative and the document clearly shows their representation. If all Indian signers other than Reyntueco signed as representatives what then makes him so unique? We can hardly ascribe the action as being a mere courtesy extended to the seeker or giver of autographs. Treaties ratified by the United States Senate are not to be dealt with so lightly.

The Commission has attempted to denigrate the presence, the signature and the identification separate from another tribe living in the described location in its effort to sustain its earlier *ipse dixit* that petitioner's predecessors in interest were not "signatories" by shifting its emphasis to the omission of the name from the preamble and the frequent use of the word "said" in the body of the treaty which contains the agreements. It is to be remembered that the agreement was not prepared by or with the Indians. It was a document of presentation, acceptance or else! Few if any changes occurred between presentation and acceptance. In whose favor is the document to be construed? If only those named in the preamble were to be "signatories" what created the necessity for the separate signing by and for the Six Nations of Sandusky, an identification written not by Reyntueco, but presumably by the draftsman of the instrument? The signature was required only if it was the meaning and intent that those Indians were to be affected

and bound by the Treaty. That obtaining the signature may have been an afterthought, a not uncommon occurrence at large and complicated real estate closings held under great pressure, does not in any way mitigate or obviate the obligations of the signatory.

The Commission has placed reliance upon *Sac and Fox Tribe* v. *United States*, 161 Ct. Cls. 189 for its determination that petitioner's predecessor in interest was not a signatory of the Treaty. There is a very stark difference between the Sac and Fox and the Senecas. The Sac and Fox were not present at Greeneville; they did not sign the document and they did not cede any lands. The Senecas were present; they signed the document and they ceded their interest in the lands conveyed under the treaty terms.

Since it is readily evident that the "signatory" is separate from and independent of those who signed above him, what effect is to be given to this act? Is the "signatory" deemed not to be a party bound and benefited if not listed in the preamble nor embraced within the narrowest possible literal construction of the word "said"; that then the act is nugatory and meaningless? Or rather is it not the declaratory and meaningful interpretation that the "signatory" is a party bound and affected by and the beneficiary of the agreements expressed in the documents so signed?

The foregoing may seem to be rhetorical belaboring of a single fact in a complex web of events, but when one thinks upon the consequence, one is faced with the realization that here at the beginning it is the end, for the Commission has inexorably applied its conceived doctrine of "exclusive exclusivity" resulting in an absolute foreclosure.

**2. The incongruity of the judgments below**

The judgments below, by refusing to recognize the compensable interests of the petitioner and then blithely awarding the title to their heritage in equal shares to five other tribes in Areas 53 and 54 and to four tribes in varying percentages in Area 87, have effected an insupportable rationing of justice.* And as Judge Bennett noted in his dissent from the order of affirmance of May 30, 1975, Appendix A of 1817 Treaty Case, it is indeed too rough to be just.

This petitioner has been deprived of the rights ostensibly given to it under the Greeneville Treaty and they are taken away for no obvious reasons other than a simplistic attempt to confine the meaning and effect of an agreement by the most literal interpretation of the document fortified perhaps by a disinclination to labor in the manner required by the statute, 25 U.S.C. 70n, and as prescribed by the Court of Claims in *Snake or Piute Indians* v. *United States,* 125 Ct. Cls. 241, and possibly a pride of authorship.

Once it has been determined that petitioner's predecessors in interest were not signatories, life becomes simple because have they not said they shared the use of the land with others even to the extent of particularizing with whom and in what place? No exclusivity! That forecloses that claim.

No need to consider Indian possession or occupation with respect to their habits or mode of life (*Mitchell* v. *United States,* 9 Peters 711, 745).

* Although the Commission rendered separate decisions for each of the 1805 and 1817 treaty transactions the issues involved and the evidence presented were identical with minor exceptions in respect of use and occupancy. Cf. Findings 8 in both cases, Appendix B. And it was agreed that the total of the evidence was submitted in each case.

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No need to consider the difference between a society founded upon a system of private exclusive property and a society organized primarily upon a communal system.

No need to consider the evidence submitted in substantiation of the assertion of use and occupancy as set forth in Appendix E.

No need to accept the observations and judgments of Lewis Cass and Duncan MacArthur who, when reporting on their negotiations for the 1817 Treaty, stated:

> —"The Wyandots who owned it, and the Senecas and Shawnee who live upon it"—
>
> —"The ancestors of some of these Indians have occupied it for generations"—
>
> —"In fact the whole of the Wyandots and all the Shawnees and Senecas in this quarter have made the last attempt to preserve the inheritance of customs and land transmitted to them by their ancestors."

Nor is there any need to consider the opinion of the Public Lands Committee of the United States Senate when, reporting the Treaty to the Senate with amendments for approval, it stated:

> —"To the Senecas, who made no cession, but are considered as co-partners with the Wyondots"—

All of this has become irrelevant.

Now comes the last problem. If the Senecas did not have a recognized title or an aboriginal title to the lands they used and occupied, what effect does this conclusion have upon the title of the remaining claimants?

At this point the Commission, relieved of the labor of dealing with aboriginal title and seemingly unwilling to deal with the last question, perhaps in an effort to be generous even though not just, proceeded to assess the proportionate interests of the remaining users and occupiers as holders of recognized title and awarded "the whole thing" i.e., recognized title to the whole of the areas including that which has been denied to petitioner by virtue of the Commission's action, to five other tribes in equal shares in respect of Areas 53 and 54 and to four tribes, one of whom was a sometime co-partner of the Senecas in varying percentages. This is accomplished in each case by means of a single conclusory finding, general in content.

Parenthetically it may be noted that one of the recipient tribes of the Seneca heritage in Areas 53 and 54 had only the most tenuous, if any, connection with the areas. In Area 87 the co-partner of the Senecas receives the major share of the Seneca heritage but it may be noted that was a partnership that has been long dissolved.

The incongruity, let alone the injustice, is apparent. It might be epitomized by stating the effect of the Commission's decision thusly

> He who had something has had it made nothing and taken from him and that nothing has been made something.

Justice is a word much abused but these judgments are an abuse of justice and cry out for correction.

We are not unmindful that this Court has recently refused to review the judgment of the Court of Claims af-

firming in part the order of the Indian Claims Commission in *Strong* v. *United States,* cert. denied, December 1975 (Dkt. 75-389), but we suggest the instant decisions portray a result which bogles the mind and should not be allowed to stand as an example of justice under law.

The Indian Claims Commission was not created for the purpose of honing broadly stated principles into the thinnest and sharpest cutting edges for use in developing a finely constructed system of legal reasoning. Rather it was intended, though perhaps not perfectly constructed, as a mechanism for achieving solutions that could be called fair and honorable for the long standing complaints of a disadvantaged group. Its semi-political purpose overshadows its legal mechanisms. One unjust result tarnishes its honorable purpose and leaves all of us, let alone the petitioner, poorer.

## Conclusion

**For the foregoing reasons the writ of certiorari to the United States Court of Claims should be granted.**

Respectfully submitted,

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# APPENDICES

## Appendix A

**Order of Court of Claims and Dissent of Judge Bennett, May 30, 1975 and Order of Court of Claims Denying Motion for Rehearing, October 10, 1975**

IN THE

UNITED STATES COURT OF CLAIMS

**Appeal No. 3-74**

JAMES STRONG, *et al.*

*v.*

THE UNITED STATES

Before SKELTON, *Judge,* Presiding, KUNZIG and BENNETT, *Judges.*

**Order**

This case comes before the court on appeal by various Indian Tribes from decisions and orders of the Indian Claims Commission in 30 Ind. Cl. Comm. 8 on April 4, 1974, and 31 Ind. Cl. Comm. 359 of September 19, 1973. After consideration of the record, the briefs, and oral argument of counsel, the court concludes that while it would have been helpful if the findings of fact could have been fuller and more extensive, the findings as made support the decision and order of the Commission and the same are sup-

ported by substantial evidence. We conclude further that there is no error of law in the decisions and orders of the Commission and that the same should be affirmed.

Accordingly, the decisions and orders of the Commission are approved and affirmed, and the case is remanded to the Commission for further proceedings in accordance with this order.

May 30, 1975

By The Court

Byron Skelton
Presiding Judge

(Judge Bennett's dissent is attached.)

*Order of Court of Claims and Dissent of Judge Bennett*

BENNETT, *Judge*, dissenting.

I agree with the majority when it says that "it would have been helpful if the findings of fact could have been fuller and more extensive." I dissent from the conclusion that notwithstanding the paucity of the findings they are nevertheless supported by substantial evidence. I do not know how you can tell. They are conclusory in nature and so abbreviated as to leave one wondering on what they are based or how arrived at. Surely, on a record so large, the triers of the facts could give an appellate court better guidance. There were many weeks of hearings, thousands of pages of transcript and hundreds of exhibits. A dozen parties, including defendant, are involved. On this the Commission gives us eight short findings and three conclusions of law on 12 pages. The claims are hotly contested in nine briefs filed with the court.

5 U.S.C. §70s charges this court on appellate review to determine (1) whether the findings of fact of the Commission are supported by substantial evidence and (2) whether the Commission's conclusions of law are supported by its findings. I would hold that on their face these findings and conclusions do not permit such review as required by the statute and would remand to the Commission for an appropriate report which would make the appellate review something less than "a cop-out" in the opinion of some of the parties who so described the Commission's findings and conclusions. I know that my colleagues in good faith feel otherwise. I simply cannot share their confidence and optimism although I respect it and share their concern about further delay in the case.

*Order of Court of Claims and Dissent of Judge Bennett*

IN THE

UNITED STATES COURT OF CLAIMS

**App. No. 3-74**

JAMES STRONG, *et al.*, etc. and Related Cases,
*Appellants,*

**App. No. 4-74**

JAMES STRONG, *et al.*, etc. and Related Cases,
*Appellants,*

**App. No. 5-74**

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*,
*Appellants,*

*v.*

THE UNITED STATES, *et al.*,
*Appellees.*

Before SKELTON, *Judge,* Presiding, KUNZIG and BENNETT, *Judges.*

**Order**

These cases come before the court on a joint motion for rehearing *en banc* filed by the Delaware, Ottawa and Seneca-Cayuga, appellants, in App. No. 3-74; a joint motion for rehearing *en banc* filed by the Ottawa, Seneca-Cayuga, Potawatomi (Prarie Band) and the Pota-

watomi (Citizens Band), appellants, in App. No. 4-74; and, an "application" (motion) by the Ottawa appellants for rehearing *en banc* in App. No. 5-74, all said motions having been filed on June 18, 1975, and deemed to have been filed pursuant to Rules 7(d) and 151. Upon consideration thereof, together wtih the opposition thereto, without oral argument, by the six active Judges of the court (Judge Kashiwa not participating) as to the suggestions for rehearing *en banc* under Rule 7(d), which suggestions are denied, and further having been so considered by the panel listed above as to the motions for rehearing under Rule 151,

It Is Ordered that the said motions and application for rehearing be and the same are denied.

Oct. 10, 1975

By The Court

Byron Skelton
Judge, Presiding

## Appendix B

**Opinion, Findings and Order of Indian Claims Commission. 30 Ind. Cl. Comm. 8**

BEFORE THE

INDIAN CLAIMS COMMISSION

**Docket No. 13-E**

JAMES STRONG, *et al.*, as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,

**Docket No. 18-L**

RED LAKE BAND, *et al.*,

**Docket No. 27-E**

THE DELAWARE TRIBE OF INDIANS,

**Docket No. 29-D**

HANNAHVILLE INDIAN COMMUNITY, *et al.*,

**Docket No. 89**

THE SIX NATIONS, *et al.*,

**Docket No. 133-A**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*, as representatives of THE OTTAWA TRIBE,

**Docket No. 139**

LAWRENCE ZANE, *et al.*, *ex rel.*, WYANDOT TRIBE, *et al.*,

**Docket No. 202**

ABSENTEE DELAWARE TRIBE OF OKLAHOMA, DELAWARE NATION, *ex rel.*, W. E. EXENDINE and MYRTLE HOLDER,

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*Opinion, Findings and Order of Indian Claims Commission*

**Docket No. 302**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*,
as representatives of THE OTTAWA TRIBE,

**Docket No. 341-C**

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, and PETER BUCK,
*et al.*, members and representatives of members thereof,
*Plaintiffs,*

**Docket No. 29-D**

POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INC.,
*Intervenor,*

*v.*

THE UNITED STATES OF AMERICA,
*Defendant.*

Decided: April 4, 1973

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs and Intervenor in Docket 29-D.

Rodney J. Edwards, Attorney for Plaintiffs in Dockets 18-L and 139.

James R. Fitzharris, Attorney for Plaintiffs in Docket 13-E.

Allan Hull, Attorney for Plaintiffs in Dockets 133-A and 302.

Paul G. Reilly, Attorney for Plaintiffs in Dockets 89 and 341-C.

Louis L. Rochmes, Attorney for Plaintiffs in Dockets 27-E and 202.

James E. Clubb, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

**Opinion of the Commission**

Blue, Commissioner, delivered the opinion of the Commission.

As a preface to this opinion I wish to point out that I concurred in the dissenting opinion of Chairman Kuykendall in the Commission's decision that the Potawatomi Indians constituted one political entity during the period 1795 to 1833. *See Citizen Band* v. *United States,* Dockets 71, *et al.*, 27 Ind. Cl. Comm. 187 (1972). Specifically as regards the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87, Chairman Kuykendall stated that, in his opinion, the Huron Potawatomi Band was the political entity with which the United States treated at Fort Industry (27 Ind. Cl. Comm. at 397-99). While I continue personally to adhere to the views expressed in Chairman Kuykendall's dissent, the conclusions I have reached in the following opinion reflect the position of the Commission with respect to the political structure of the Potawatomi Indians in 1805, as has been determined by a majority of the Commission in the case aforementioned.

This consolidated proceeding involves the determination of title claims by the various plaintiffs to the areas identified as Areas 53 and 54 on Royce's Map of Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897. Representatives of several Indian tribes relinquished their interests in these areas at the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87.

Royce Areas 53 and 54 encompass the north-central portion of the present state of Ohio, from Lake Erie on the north to the United States-Indian boundary established at the Treaty of Greeneville, August 3, 1795, 7 Stat. 49, on

the south, and from the Cuyahoga and Tuscarawas Rivers on the east to Sandusky Bay, and south therefrom, on the west. Royce Area 53, the portion of this territory north of 41° north latitude, was a part of the Connecticut Western Reserve. It remained under the political jurisdiction of Connecticut until 1800, when Connecticut granted to the United States the right of political jurisdiction, reserving, however, to herself and her grantees the right to the soil. In 1792, the Connecticut legislature had granted 500,000 acres at the western end of Royce Area 53 to those of her citizens who had suffered by the depredations of the British during the Revolutionary War. Under this grant a company was chartered under the laws of Ohio, and the tract became known as "Sufferers' Land". Connecticut had also granted the area between Sufferers' Land and the Cuyahoga River to the Connecticut land company in 1795 and 1796.

The Dockets captioned above were consolidated by the Commission's order of November 4, 1960, for purposes of trying the issue of title to these areas.

The Potawatomi Indians of Indiana and Michigan, Inc., have been permitted to intervene by the Commission's order of March 28, 1972, 27 Ind. Cl. Comm. 325, 326.

The Greeneville Treaty Line began at a point where Cleveland, Ohio, is now located, ran south about 70 miles, then almost due west across central Ohio to a point midway on the Ohio-Indiana border near Fort Recovery, and then south-southwest in Indiana to the Ohio River. Under Article IV of the treaty, the United States relinquished with certain enclaves excepted, claims to all the Indian lands west and north of the Greeneville Treaty Line and, under

Article V, conferred upon the Indians participating at the treaty the right permanently to occupy the lands on the Indian side of the Greeneville Treaty Line. Among the enclaves was the six mile square area in the north-western corner of Royce Area 53 identified by a dotted black line on Royce's Map of Ohio. The 1795 Greeneville Treaty did not, however, establish boundaries among the tribes within their lands.

Among those Indians signing the 1795 Greeneville Treaty were representatives of the Wyandot, Delaware, Shawnee and Potawatomi Tribes, and representatives of those bands of Ottawa and Chippewa Indians known, respectively, as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, and the Chippewas of the Saginaw. *See Citizen Band* v. *United States,* Dockets 71, *et al.,* 27 Ind. Cl. Comm. 187, 323 (1972); *Saginaw Chippewa Indian Tribe* v. *United States,* Dockets 57, *et al.,* 22 Ind. Cl. Comm. 504, 522 (1970); and *Ottawa Tribe* v. *United States,* Dockets 40-B, *et al.,* 2 Ind. Cl. Comm. 461, 466 (1953). The Indian identified as "Reyntueco, (of the Six Nations, living at Sandusky,)" signed the treaty as a representative of the Delawares.

Royce Areas 53 and 54, which were on the Indian side of the Greeneville Treaty Line (the Line comprised the eastern boundary of Royce Area 53 and the eastern and southern boundaries of Royce Area 54), were relinquished by representatives of the "Wyandot, Ottawa, Chipawa, Munsee and Delaware, Shawanee, and Pottawatima nations" at the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87. The land companies which had been the recipients of

grants by Connecticut to the area comprising Royce Area 53 desired to extinguish Indian title and claims to this area. Therefore they requested that the United States conduct a treaty with the Indians who claimed rights therein. Charles Jouett, who was appointed United States Commissioner to hold the treaty, was also instructed to gain, if possible, the cession of Royce Area 54, south of Royce Area 53 and north of the Greeneville Treaty Line.

The treaty signed at Fort Industry included relinquishment by the Indians of their claims to both Royce Areas 53 and 54.[1] Royce Area 54 was relinquished to the United States for a consideration of $825.00 payable annually "forever" to the "Wyandot, Munsee and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots". This $825.00 annuity, according to Jouett, represented the legal interest on $13,750.00. The Indians quitclaimed Royce Area 53 to the land companies for a total consideration, paid by the land companies, of $18,916.67.[2] Of this amount, $4,000.00 was paid immediately to the Ottawa and Chipawa nations, and such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighbourhood thereof", and the two land companies "secured to the President of the United

1. The six mile square enclave at the northwestern corner of Royce Area 53 had been ceded at the 1795 Greeneville Treaty. Docket 13-G, *et al.*, consolidated, involves claims to the areas ceded at the 1795 Greeneville Treaty. Title to this enclave is not at issue here.

2. A separate treaty between the United States, acting as agent for the land companies, and the same Indians, was concluded the same day and incorporated by reference in the Fort Industry Treaty. *See* Def. Ex. A-252; *American State Papers,* Indian Affairs, Vol. 1, at 696.

States in trust for" these same Indians, the sum of $12,000.00, payable to them in six annual instalments of $2,000.00 each. The two land companies further secured to the President in trust for the "Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots", an annuity of $175.00. The treaty recites in Article V that the proportions of the payments to "the Ottawa and Chipawa nations, and such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighbourhood thereof" had been "agreed on and concluded by the whole of said nation in their general council," and Article IV states that the annuity payments to the "Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots" would be "divided between said nations, from time to time, in such proportions as said nations, with the approbation of the President, shall agree," 7 Stat. at 88.

The 1805 Fort Industry Treaty was signed by representatives of the Delaware, Shawnee, Wyandot and Potawatomi Tribes. The Commission has previously held that those Ottawas who signed the Fort Industry Treaty were the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf. *See Ottawa Tribe* v. *United States*, *supra*. All of the above were parties to the 1795 Greeneville Treaty. Furthermore, we believe that those bands of Chippewas who participated at Greeneville in 1795 were also participants at the Fort Industry Treaty. We rest this conclusion upon the fact that the references in the Fort Industry Treaty to the 1795 Greeneville Treaty indicate

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that the United States knew it was dealing with the same parties.

The legal effects stemming from the 1795 Greeneville Treaty have often been spelled out by the Court of Claims and this Commission. In the case of *Peoria Tribe* v. *United States,* Docket 289, 19 Ind. Cl. Comm. 107, 120-21 (1968), the Commission described those effects as follows:

> * * * Under Article III of the Greenville Treaty * * * a common boundary was strategically negotiated. To give the new line real meaning the Indians relinquished all tribal claims to those lands situated generally east and south of the Greenville line, while the United States, with [a] few exceptions * * *, relinquished all claims they might have to the Indian tribal lands situated west and north of the 1795 Greenville line.
>
> By this relinquishment the United States guaranteed to the Indian tribes negotiating the 1795 Greenville Treaty, more than mere temporary or permissive use and possession of the lands upon which they then were living. As the Commission concluded on a prior occasion, this "relinquishment" was indeed recognition by the United States that permanent ownership of these lands shall be in the occupying tribes. Thus these Indians were accorded legal rights to their homelands, the deprivation of which through governmental action would command just compensation. * * *
>
> * * * The integral follow-up treaties, that is, the post 1795 treaties of cession negotiated with the Greenville Treaty Indians, not only defined with particularity the intertribal boundaries, but also confirmed the previously recognized title. * * *

The Court of Claims has held in *Sac and Fox Tribe* v. *United States,* 161 Ct. Cl. 180 (1963), *cert. denied,* 375 U.S.

921 (1963) (*aff'g* Docket 83, 7 Ind. Cl. Comm. 675 (1959)), that only tribes signatory to the 1795 Greeneville Treaty were accorded rights thereunder.

The defendant has argued that recognition of title to Royce Area 53 by the United States at Greeneville in 1795 was not possible since the lands comprising Royce Area 53 were not then public lands. This argument is without merit because we have previously held that the United States may be liable in a recognized title claim for its own act of purporting to grant title by treaty to lands it did not own. *See Kiowa, Commanche and Apache Tribe* v. *United States,* Docket 257, 26 Ind. Cl. Comm. 101, 117-18 (1971); *Seneca Nation* v. *United States,* Dockets 342-B, *et al.,* 20 Ind. Cl. Comm. 177, 181 (1968). The latter case also held that subsequent disposition by the Indians of such lands was under the protection of the Trade and Intercourse Act of 1790, 1 Stat. 137, and that under the Indian Claims Commission Act, 60 Stat. 1049, the United States may be held responsible in damages where the Indians failed to receive a conscionable consideration from private parties for the subsequent disposition of such lands. 20 Ind. Cl. Comm. at 181-82. *See also Cayuga Nation* v. *United States,* Docket 343, 28 Ind. Cl. Comm. 237 (1972); *Oneida Nation* v. *United States,* Docket 300-A, 25 Ind. Cl. Comm. 281 (1971).

Based upon what we have said above, we concluded that those tribes and bands of Indians who participated at the 1795 Treaty of Greeneville and who were then using and occupying Royce Areas 53 and 54 were, by virtue of said treaty, together with the "follow-up"[3] treaty of July 4,

3. *See Sac and Fox Tribe* v. *United States, supra,* at 194.

1805, granted recognized title to these areas. By executing and ratifying the 1805 Fort Industry Treaty the United States determined and confirmed the boundaries and ownership of the lands previously relinquished to said Indians under the 1795 Greeneville Treaty. Thus it follows that those tribes and groups of Indians who had participated at the 1795 Greeneville Treaty and who were then using and occupying Royce Areas 53 and 54 held recognized title to these areas as of July 4, 1805: namely, the Delaware Tribe, represented in these proceedings by the plaintiffs in Dockets 27-E and 202; the Wyandot Tribe represented in these proceedings by the plaintiffs in Docket 139; the Potawatomi Tribe, represented in these proceedings by the plaintiffs and intervenor in Docket 29-D; the bands of Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, represented in these proceedings by the plaintiffs in Dockets 133-A and 302; and the bands of Chippewa of the Saginaw, represented in these proceedings by the plaintiffs in Docket 13-E. The Mingoes, represented in these proceedings by the plaintiffs in Docket 341-C, were not signatories to the 1795 Greeneville Treaty and therefore derived no benefits therefrom. Furthermore, non-exclusive use and occupancy of portions of Royce Areas 53 and 54 prior to 1805 by these Mingoes forecloses any claim based upon aboriginal ownership of any portions of these areas. That Mingo use and occupancy of portions of Royce Areas 53 and 54 was non-exclusive is established by the evidence herein and admitted by the plaintiff Seneca-Cayuga Tribe. The Shawnee Indians, while signatories to the 1795 Greeneville Treaty, were not using and occupying Royce Areas 53

and 54. Theerfore, in the absence of any Shawnee identification with Royce Areas 53 and 54, we conclude that the Shawnee Indians did not gain recognized title to any of these areas at the 1795 Greeneville Treaty.[4] The claims of the Red Lake Band, *et al.*, in Docket 18-L, and The Six Nations, *et al.*, in Docket 89, are not supported by any evidence.

The final question to be resolved in this stage of these proceedings is the proportion or part of the territory comprising Royce Areas 53 and 54 to which each of the above-specified entities was accorded recognized title. Different methods have been utilized in various cases before this Commission and the Court of Claims to apportion interests in areas where recognized title was granted to more than one Indian entity, and the object, of course, has always been the same—to achieve the most just and equitable result on the evidence available. Population figures were used in *Sioux Nation* v. *United States*, Dockets 74, *et al.*, 24 Ind. Cl. Comm. 147, 157-59 (1970). Analysis of use and occupancy of the recognized title area may also be used where such evidence is available and reliable. *See Otoe and Missouria Tribe* v. *United States*, Dockets 11-A, *et al.*, 5 Ind. Cl. Comm. 316, 349-50, 365-66 (1957). A third method was that employed in *Kickapoo Tribe* v. *United States*, Dockets 317, *et al.*, 10 Ind. Cl. Comm. 279 (1962),

4. Latter-day representatives of the aboriginal Shawnee Tribe apparently acknowledged this fact, as evidenced by their failure to file claims involving these Royce areas. The Shawnees who signed the Fort Industry Treaty were presumably those who were residing with the Wyandots. *See* Article IV, Treaty of Fort Industry, July 4, 1805, 7 Stat. 87, 88, and Article XIII, Treaty of September 29, 1817, 7 Stat. 160, 165.

*aff'd,* 174 Ct. Cl. 550 (1966), where, in the absence of evidence of discrete regions of predominant use and occupancy, undivided fractional interests were awarded. In *Red Lake, Pembina and White Earth Bands* v. *United States,* 164 Ct. Cl. 389 (1964) (*rev'g* Docket 18-A, 6 Ind. Cl. Comm. 247 (1958), 9 Ind. Cl. Comm. 315 (1961) and 9 Ind. Cl. Comm. 457 (1961)), interests in an aboriginal title area were divided in the same proportions as was the treaty consideration, but the consideration was based upon population of the bands at the time.

Apportionment of the relative interests among those Indian entities found to own a particular area is always a difficult process. The Commission has wide discretion with regard to the alternative methods available to reach the most equitable result. *See Kickapoo Tribe* v. *United States, supra,* at 555.

The language of the treaty should be analyzed first to determine whether it contains a statement of relative interests in the lands. In a particular treaty, the language of the cession itself or the division of consideration may reflect the division of such interests. The treaty, however, may not define relative interests in the lands ceded, or may contain ambiguities (as, for instance, obvious inconsistencies between the language of cession and the division of consideration), or other evidence may indicate that reliance upon the treaty language is inappropriate. In such instances, evidence of use and occupancy of the lands and evidence of the population of the various Indian groups using and occupying the lands may provide the best evidence upon which to make a division of interests. All of these factors have

been utilized in varying degrees, depending upon their reliability in specific instances, in the cases cited above. Where the evidence is inconclusive, or where, as in *Kickapoo, supra,* there is no evidence, equal undivided interests may be awarded.

In this case, the language of the 1805 Fort Industry Treaty does not provide us with any specific information as to the relative interests of the Indian groups who ceded Royce Areas 53 and 54. The overall language of the treaty, including the near-equal division of the consideration, does, however, indicate that all the signatory Indians ceded whatever interests they had in all of these lands taken as a whole and that those present at the treaty did not regard the Indian interests in Royce Areas 53 and 54 as substantially disproportionate.

The other evidence in this case does not contradict the conclusions gathered from the treaty itself. A great deal of documentary evidence has been filed in these proceedings, and extensive reports have been submitted by expert witnesses for the various parties herein, relating to Indian use and occupancy of Royce Areas 53 and 54. This evidence does not support either a geographical division of the ceded areas based on predominant use and occupancy or an unequal apportionment of fractional interests in the whole. The evidence of use and occupancy indicates that the tribes and groups whose title to Royce Areas 53 and 54 was recognized at the 1795 Greeneville Treaty, as confirmed and determined by the 1805 Fort Industry Treaty, were, at the time of these treaties, using and occupying these areas jointly without clearcut tribal boundaries and that no par-

ticular group or groups predominated. We believe the expert testimony supports these conclusions.[5]

Estimates of Indian populations in the 18th century of large areas such as involved in this case are generally unreliable when they are available at all. We do have population estimates by contemporary observers of some Indian locations within these lands but there is no way to determine with any degree of accuracy the total populations of the various Indian groups within Royce Areas 53 and 54 during the relevant period.

Based upon all the considerations set forth above, we believe that the best manner of division of interests in this proceeding is that utilized in the *Kickapoo* case, *supra;* i.e., equal undivided fractional interests in the recognized title areas.

We have pointed out in our findings of fact that, while the consideration under the Fort Industry Treaty was apportioned separately to all the tribes for the relinquishment of Royce Area 53 and to only certain of the tribes for the relinquishment of Royce Area 54, the language of the treaty clearly indicates that it was all the signatory tribes who were relinquishing their interests in both tracts. Therefore, the transaction was, in substance, a cession by each signatory Indian entity of its interests in both Royce Areas 53 and 54 in return for a near-equal fractional share of the total consideration. With respect to this issue, Com-

5. *See* Pl. Ex. 160, Docket 139, Tanner, *The Location of Indian Tribes in Southeastern Michigan and Northern Ohio*, 1700-1817, at 42; Testimony of Robert F. Bauman, June 18, 1964, Transcript, at 3382-3438; Def. Ex. A-322, Docket 13-E, Wheeler-Voegelin, *Ethnohistorical Report*, Royce Ares 53-54, at 198-202, 221-24.

missioner Jouett's contemporaneous interpretation of the treaty supports our analysis (finding of fact No. 7, *infra*) and none of the parties have viewed the treaty otherwise.

We therefore conclude that, as of July 4, 1805, the effective date of the Fort Industry Treaty, the Delaware, Wyandot and Potawatomi Tribes, and the bands of Ottawa Indians and Chippewa Indians known, respectively, as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, and the Chippewas of the Saginaw, each had recognized title to an undivided one-fifth interest in Royce Areas 53 and 54, excluding the six mile square enclave in northwestern Royce Area 53 which had been previously ceded to the United States at the 1795 Greeneville Treaty.

This case may now proceed to a determination of the acreage of the ceded lands, the fair market value thereof as of July 4, 1805, the consideration given for the cessions, and all other matters bearing upon the question of defendant's liability to the separate plaintiffs and intervenor.

BRANTLEY BLUE

Brantley Blue, Commissioner

We concur:

JOHN T. VANCE

John T. Vance, Commissioner

RICHARD W. YARBOROUGH

Richard W. Yarborough, Commissioner

MARGARET H. PIERCE

Margaret H. Pierce, Commissioner

Kuykendall, Chairman, concurring in part and dissenting in part.

I concur in the conclusions expressed in the foregoing opinion and the accompanying findings of fact except the conclusion that the Potawatomi Tribe possessed an undivided one-fifth interest in the subject Royce areas. My opinion is that the Huron Potawatomi Band, as a distinct political entity, acquired recognized title to an undivided one-fifth interest in Royce Areas 53 and 54 at the 1795 Greeneville Treaty and that said band, alone among the Potawatomis, relinquished its interests in these areas at the 1805 Fort Industry Treaty. *See* my dissenting opinion in *Citizen Band* v. *United States*, Dockets 71, *et al.*, 27 Ind. Cl. Comm. 187, 397-99 (1972).

JEROME K. KUYKENDALL

Jerome K. Kuykendall, Chairman

BEFORE THE

INDIAN CLAIMS COMMISSION

**Docket No. 13-E**

JAMES STRONG, *et al.*, as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,

**Docket No. 18-L**

RED LAKE BAND, *et al.*,

**Docket No. 27-E**

THE DELAWARE TRIBE OF INDIANS,

**Docket No. 29-D**

HANNAHVILLE INDIAN COMMUNITY, *et al.*,

**Docket No. 89**

THE SIX NATIONS, *et al.*,

**Docket No. 133-A**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*, as representatives of THE OTTAWA TRIBE,

**Docket No. 139**

LAWRENCE ZANE, *et al., ex rel.*, WYANDOT TRIBE, *et al.*,

**Docket No. 202**

ABSENTEE DELAWARE TRIBE OF OKLAHOMA, DELAWARE NATION, *ex rel.*, W. E. EXENDINE and MYRTLE HOLDER,

*Opinion, Findings and Order of Indian Claims Commission*

**Docket No. 302**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*,
as representatives of THE OTTAWA TRIBE,

**Docket No. 341-C**

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, and PETER BUCK,
*et al.*, members and representatives of members thereof,
*Plaintiffs,*

**Docket No. 29-D**

POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INC.,
*Intervenor,*

*v.*

THE UNITED STATES OF AMERICA,
*Defendant.*

Decided: April 4, 1973

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. *History of Claims*: Petitions were consolidated in the above-captioned proceedings by the Commission's order of November 4, 1960, for the purpose of trying the issues relating to the title claims of the respective plaintiffs to Areas 53 and 54 on Royce's Map of Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897. Indian interests in Royce Areas 53 and

54 were relinquished at the Treaty of Fort Industry, July 4, 1805 (7 Stat. 87).

Subsequent to the consolidation of these claims, one continuous hearing was held during which evidence was presented with respect to this consolidated proceeding and with respect to two other consolidated proceedings, Dockets 13-F, *et al.*, consolidated, involving claims of title to Royce Areas 87 and 88, Ohio, Michigan and Indiana, which were ceded at the Treaty of September 29, 1817 (7 Stat. 160), and Dockets 59, *et al.*, consolidated, involving claims of title to Royce Area 66, Michigan and Ohio, ceded at the Treaty of November 17, 1807 (7 Stat. 105). It was stipulated among the parties that any of the evidence in the continuous hearing might be used and would be applicable to any or all of the three sets of consolidated claims.

By the Commission's order of March 28, 1972, 27 Ind. Cl. Comm. 325, 326, the Potawatomi Indians of Indiana and Michigan, Inc., a Michigan corporation, were permitted to intervene under Docket 29-D.

2. *Parties.* Each of the tribal plaintiffs and the intervenor herein has the right and capacity under section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050) to bring and maintain these actions before the Indian Claims Commission on behalf of their respective predecessors.

The claims of the plaintiffs in Docket 18-L, the Red Lake Band, *et al.*, and in Docket 89, The Six Nations, *et al.*, are not supported by any evidence. Accordingly, we find these plaintiffs have no interests in the matters at issue here.

3. *The 1795 Treaty of Greeneville.* Under the provisions of the Treaty of Greeneville, August 3, 1795, 7 Stat. 49, the United States and the representatives of the tribes signatory thereto agreed to the establishment of a general boundary line between the lands of the United States and the lands of the Indian tribes. The Greeneville Treaty Line began at a point where Cleveland, Ohio, is now located, ran south about 70 miles, then almost due west across central Ohio to a point midway on the Ohio-Indiana border near Recovery, and then south-southwest in Indiana to the Ohio River.

By Article III of the 1795 Greeneville Treaty the signatory Indian tribes ceded and relinquished all claims east and south of the Greeneville Treaty Line, and in consideration of these tribal cessions, the United States, under Article IV of the treaty, relinquished, with certain small areas excepted, claims to all the Indian lands situated west and north of the Greeneville Treaty Line. One of these excepted areas was defined in the second paragraph of Article III of the Treaty as: "One piece six miles square upon Sandusky lake, where a fort formerly stood," 7 Stat. at 50.[1]

The effect of this relinquishment by the United States is more precisely defined under Article V of the 1795 Greeneville Treaty wherein it is stated:

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them,

1. This area is identified by a dotted black line in the northwestern corner of Royce Area 53 on Royce's Map of Ohio.

> hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever. [7 Stat. at 52.]

Insofar as here pertinent, representatives of the Wyandot, Delaware, Shawnee and Potawatomi Tribes signed the 1795 Greeneville Treaty. Representatives of those bands of Ottawa Indians known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf also signed the treaty, as did those bands of Chippewa Indians known as Chippewas of the Saginaw. Among those who signed with the Delawares was one Indian referred to as "of the Six Nations, living at Sandusky."

By the terms of the 1795 Greeneville Treaty, the United States relinquished its claim to the Indian lands within a defined area. That relinquishment was intended to confer on the Indian participants using and occupying that area the right permanently to occupy the lands on the Indian side of the Greeneville Treaty Line without interference. The 1795 Greeneville Treaty was, therefore, one in which the United States granted general recognition of the title of those Indians who were parties to the treaty to the lands being used and occupied by them on the Indian side of the Greeneville Treaty Line. While the 1795 Treaty of Greene-

ville did not fix boundaries between the tribes, the United States intended and led the tribal representatives to believe that such boundaries would be established through future negotiations. These boundaries were subsequently defined in several "follow-up"[2] treaties with those Indians signatory to the 1795 Greeneville Treaty including the Fort Industry Treaty.

4. *Royce Areas 53 and 54.* The 1805 Fort Industry Treaty changed the boundary line between the United States and the Indians which had been established at the 1795 Treaty of Greeneville by including within the lands of the United States the territory bounded on the west by a line 120 miles due west of the western boundary of the State of Pennsylvania, on the north by the Canadian border, i.e., Lake Erie, and on the east and south by the Greeneville Treaty Line. This territory is designated on Royce's Map of Ohio as two tracts, Areas 53 and 54, encompassing a total of approximately 3,000,000 acres of land. These two tracts are divided by the line of 41° north latitude.

Area 53, north of that line, constituted a portion of the Connecticut Western Reserve. The colonial charter of Connecticut embraced all the lands between 41° and 42°2′ from the Atlantic to the Pacific Oceans. By deed dated September 14, 1786, Connecticut relinquished to the United States all title and jurisdiction to her western claims except for a tract north of 41° and east of a line 120 miles west and parallel to the western boundary of the State of Pennsylvania. In 1792, the Connecticut legislature granted

2. *See Sac and Fox Tribe* v. *United States,* 161 Ct. Cl. 189, 194 (1963), *cert. denied,* 375 U. S. 921 (1963) (*aff'g* Docket 83, 7 Ind. Cl. Comm. 675 (1959)).

500,000 acres at the western end of the Reserve to such of her citizens as had suffered by the depredations of the British during the Revolutionary War. This tract became known as "Sufferers' Land." Connecticut granted the area between the Sufferers' Land and the Cuyahoga River to the Connecticut land company in 1795 and 1796. In 1800, the Connecticut legislature granted to the United States the right of political jurisdiction over the above areas reserving, however, to herself and her grantees the right to the soil.

The territory comprising Royce Areas 53 and 54, excluding the six mile square enclave in northwestern Royce Area 53 ceded to the United States at the 1795 Greeneville Treaty, was included within the lands which the United States relinquished to the Indians under the terms of the 1795 Greeneville Treaty and was, therefore, part of the lands in which the United States at said treaty, together with the "follow-up" treaties, recognized the title of the signatory Indian tribes who were using and occupying the lands.

5. *Background of the 1805 Fort Industry Treaty.* In late 1804 and early 1805, officials of the two land companies which had been granted lands by Connecticut within Royce Area 53 requested of President Thomas Jefferson:

> * * * liberty to hold a treaty with the Indian tribes, claiming a native title to * * * the Connecticut reservation, * * * and that power and authority may be granted them to extinguish the native claim and title to said tract of land, and that a commission may be, by the President of the United States, appointed to hold a

> treaty with said Indian tribes, claiming the native right to those lands, and vested with power to accomplish the object prayed for. (Ottawa Ex. 276; *American State Papers,* Indian Affairs, Vol. I, at 702).

On April 2, 1805, Secretary of War Dearborn notified Charles Jouett that the President had appointed Jouett to hold a treaty with those Indians claiming rights with Royce Areas 53 and 54. *Id.* Dearborn's letter to Jouett then states:

> The object of the proposed treaty being principally that of affording the Connecticut land companies, (who hold the pre-emptive right, under the State of Connecticut, to a certain part of the land above described) an opportunity to purchase the Indian title to the lands claimed by the said companies, your duties will chiefly consist, in notifying the chiefs of the several nations, who are interested, of the time and place of holding said treaty; and in presiding thereat, for the purpose of seeing that any bargain, which the agents of the said companies may enter into with the proper representatives of the Indian nations, shall be fair and just, and well understood by the parties.
>
> You will use your influence to induce the Indians to make a cession of the lands claimed by the Connecticut companies, on reasonable terms, such as they and their respective nations, will, or ought, to be satisfied with.
>
> The agents of those companies will produce their authorities for entering into, and complying with, any stipulations that shall be agreed upon with your consent, as commissioner on the part of the United States.
>
> * * *

> If the Indian chiefs shall appear disposed to cede, not only the lands claimed by the Connecticut companies, but any part, or the whole of their lands, lying between the lands, claimed by the said companies, and the present boundary, as established at the treaty of Greeneville, and since run and marked by the United States, you are authorized to negotiate with them for so much of the same as they will consent to cede, on terms not exceeding two cents per acre. (*Id.*, at 703.)

6. *The 1805 Fort Industry Treaty.* Pursuant to these instructions, Jouett concluded a treaty with "the sachems, chiefs, and warriors of the Wyandot, Ottawa, Chipawa, Munsee and Delaware, Shawanee, and Pottawatima nations" at Fort Industry on July 4, 1805. Article II of the treaty established the boundary line between the United States and the Indians as the western boundary of Royce Areas 53 and 54 from Lake Erie on the north, south to the Greeneville Treaty Line. Article III recites the cession of Royce Area 54 by the signatory tribe to the United States for a consideration (as stated in Article IV) of $825.00 payable annually "forever" to the "Wyandot, Munsee and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots".[3] Simultaneously, the signatory Indians quitclaimed their interests in Royce Area 53 to the two land companies for a consideration of $18,916.67. Articles IV and V recite this transaction.[4]

3. Jouett reported that this annuity represented the legal interest on $13,750.00. *See* finding of fact No. 7, *infra.*

4. A separate treaty between the United States, acting as agent for the land companies, and the same Indians, was concluded the same day and incorporated by reference in the Fort Industry Treaty. *See* Def. Ex. A-252, *Amer. St. Pap.*, Ind. Aff. Vol. 1, at 696.

In Article V it is stated that the sum of $4000.00 had been received from the two land companies by "the Ottawa and Chipawa nations, and such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighbourhood thereof," and that the two land companies had further "secured to the President of the United States in trust for these same Indians the sum of $12,000.00, payable to them in six annual instalments of $2,000.00 each."

In Article IV it is stated that the two land companies had secured to the President in trust for the "Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots," an annual annuity of $175.00. The treaty recites in Article V that the proportions of the payments to "the Ottawa and Chipawa nations, and such of the Pottawatima nation as resides on the river Huron of lake Erie, and in the neighbourhood thereof" had been "agreed on and concluded by the whole of said nation in their general council," and Article IV states that the annuity payments to "the Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca Nations who reside with the Wyandots" would be "divided between said nations, from time to time, in such proportions as said nations, with the approbation of the President shall agree."[5]

5. In 1807 and, again, in 1810, Governor Hull of the Michigan Territory reported that these nations "have agreed that the division shall be made according to the numbers of the respective Nations * * *". (Ottawa Ex. 302; *Mich. Hist. Coll., Documents Relating to Detroit and Vicinity, 1805-1813* (Lansing, 1929), Vol. 40, at 310.) There is a reference in Article 13 of the Treaty of September 29, 1817, 7 Stat. 160, 165, with the "Wyandot, Seneca, Delaware, Shaw-

*(footnote continued on next page)*

Representatives of the Delaware, Shawnee, Wyandot and Potawatomi Tribes signed the 1805 Fort Industry Treaty. The treaty was also signed by representatives of those bands of Ottawa Indians known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, and by representatives of those bands of Chippewa Indians known as Chippewas of the Saginaw.

The 1805 Treaty of Fort Industry confirmed the general recognition of title granted at the 1795 Greeneville Treaty to those tribes and groups signatory to the latter treaty who were using and occupying Royce Areas 53 and 54.

7. *Contemporaneous Interpretation of the 1805 Fort Industry Treaty.* On July 4, 1805, the date the treaty was signed, Jouett forwarded the treaty to Secretary Dearborn with the following letter of explanation:

> I have the honor to lay before you a treaty, this day concluded with the Wyandot, Ottawa, Chippewa, Munsee, Delaware, Shawanee, and part of the Potta-

---

anese, Potawatamees, Ottawas, and Chippeway, tribes of Indians," to the fact that the United States had paid the Shawnees the sum of $2,500.00 "being one half of five years' annuities due by the treaty of Fort Industry." The Wyandots contended (and the United States commissioners agreed) that the annuity should have been paid to them "and a few persons of the Shawanese and Senecas tribes" living with them and the commissioners engaged that the United States would pay this $2500.00 to the Wyandots. There is notihng to substantiate the claim of certain of the plaintiffs that this reference involved any change in the agreed upon population basis for distribution. The Fort Industry treaty provided that the total $1,000.00 annuity would be proportioned among "the Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots." The controversy, resolved in Article 13 of the Treaty of September 29, 1817, seemingly involved only the question of who should be the recipient of the share of "those of the Shawanee and Seneca nations who reside with the Wyandots."

watamy nation of Indians; wherein, they convey to the United States all that tract of country lying south of the Connecticut reserve, and north of the boundary line established by the treaty of Greenville, and west of the Pennsylvania line, one hundred and twenty miles; the cession containing by estimation, twelve hundred thousand acres. The treaty requires not a dollar of the United States in advance, but simply an annuity of eight hundred and twenty-five dollars, the legal interest on thirteen thousand seven hundred and fifty dollars; bringing the purchase to rather more than one cent per acre. The Connecticut companies have also obtained a cession of their lands, for eighteen thousand nine hundred and sixteen dollars and sixty-seven cents; four thousand dollars they paid the Indians in cash, twelve to be paid in six equal annual instalments (sic), and two thousand nine hundred and sixteen dollars and sixty-seven cents into the hands of the President, in six percent stock, and such other security as he may require, for producing an annuity of one hundred and seventy-five dollars, creating an annual sum to be paid to the Indians, at one thousand dollars per year; the several sums are to be secured to the President of the United States, in such manner as he may think proper to direct. You will see by those treaties, that an annuity is to be paid, of one thousand dollars, to the Wyandot, Delaware, and such of the Seneca and Shawanee nations that reside with the Wyandots; and an instalment of two thousand dollars per year, for six years, to the Ottawa, Chippewa, and such of the Pattawatamies, as reside on the river Huron of lake Erie; which several sums constitute the full amount of all the moneys given for the several tracts of land purchased. (Ottawa Ex. 276; *Amer. St. Pap.*, Ind. Aff., Vol. I, at 703.)

8. *Use and Occupancy of Royce Areas 53 and 54.* From 1750 until 1805, the territory comprising Royce Areas 53 and 54 (excluding the six mile square enclave in the northwestern corner of Royce Area 53 ceded to the United States at the 1795 Greeneville Treaty) was the scene of joint use and occupancy by several Indian tribes and groups.[6] There are reports of Wyandots, Ottawas, Delawares, Munsees, Chippewas, Potawatomis, Mohawks and Moravian Christian Indians settled or hunting in western Royce Area 53, particularly along the Huron River, at various dates during this period. In eastern Royce Area 53 we have documentation of Mingoes, Ottawas, Chippewas, Wyandots, Delawares, Munsees, and Moravian Christian Indians, mostly observed settled or hunting along the Cuyahoga River (the eastern boundary of Royce Area 53). Over the entire period, there are reports of Mingoes, Mohawks, Delawares, Munsees, Wyandots, Ottawas and Moravian Christian Indians scattered across Royce Area 54. The picture that emerges is one of small pockets of the various tribes and groups interspersed throughout these areas with conglomerations of these small concentrations along the waterways within the two areas.[7] There were no large regions used and occupied by any particular tribe or group to the exclusion of others.

Except the references in the 1805 Fort Industry Treaty to Shawnees residing with the Wyandots and later refer-

6. The six mile square enclave in the northwestern corner of Royce Area 53 was for a long time prior to 1795 an area used and occupied by the Wyandots. This area was the northeastern extremity of the large area of Wyandot use and occupancy extending from this enclave south-southwest along the waters of the Sandusky River.

7. *See* Ottawa Ex. 511c, Dockets 133-A and 302, and Def. Ex. A323.

ence in the Treaty of September 29, 1817, 7 Stat. 160, 165, to "a few * * * Shawanese" living with the Wyandots, there is no documentation of Shawnee use and occupancy of Royce Areas 53 and 54 during this period.

## Conclusions of Law

1. The claims to Royce Areas 53 and 54 in the petitions of The Red Lake Band, *et al.*, in Docket 18-L, and The Six Nations, *et al.*, in Docket 89, are not supported by any evidence. Therefore, the claims in Docket 18-L should be dismissed and the claims in Docket 89 severed from any further part in these consolidated proceedings.

2. The predecessors of The Seneca-Cayuga Tribe of Oklahoma, *et al.*, plaintiffs in Docket 341-C, were not signatories to the 1795 Treaty of Greeneville and acquired no rights of thereunder. Furthermore, these Indians did not possess aboriginal title to any portions of Royce Areas 53 and 54 as of July 4, 1805. Accordingly the claim in Docket 341-C should be dismissed.

3. As of July 4, 1805, the effective date of the Fort Industry Treaty, the Delaware Tribe, represented in these proceedings by the plaintiffs in Dockets 27-E and 202; the Wyandot Tribe, represented in these proceedings by the plaintiffs in Docket 139; the Potawatomi Tribe, represented in these proceedings by the plaintiffs and intervenor in Docket 29-D; the bands of Ottawa Indians known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, represented in these proceedings by the

plaintiffs in Dockets 133-A and 302; and the Chippewa Indians known as the Chippewas of the Saginaw, represented in these proceedings by the plaintiffs in Docket 13-E, each had recognized title to an undivided one-fifth interest in Royce Areas 53 and 54, excluding the six mile square enclave in northwestern Royce Area 53 ceded to the United States at the 1795 Treaty of Greeneville.

JOHN T. VANCE

John T. Vance, Commissioner

RICHARD W. YARBOROUGH

Richard W. Yarborough, Commissioner

MARGARET H. PIERCE

Margaret H. Pierce, Commissioner

BRANTLEY BLUE

Brantley Blue, Commissioner

BEFORE THE

INDIAN CLAIMS COMMISSION

**Docket No. 13-E**

JAMES STRONG, *et al.*, as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,

**Docket No. 18-L**

RED LAKE BAND, *et al.*,

**Docket No. 27-E**

THE DELAWARE TRIBE OF INDIANS,

**Docket No. 29-D**

HANNAHVILLE INDIAN COMMUNITY, *et al.*,

**Docket No. 89**

THE SIX NATIONS, *et al.*,

**Docket No. 133-A**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*, as representatives of THE OTTAWA TRIBE,

**Docket No. 139**

LAWRENCE ZANE, *et al., ex rel.*, WYANDOT TRIBE, *et al.*,

**Docket No. 202**

ABSENTEE DELAWARE TRIBE OF OKLAHOMA, DELAWARE NATION, *ex rel.*, W. E. EXENDINE and MYRTLE HOLDER,

*Opinion, Findings and Order of Indian Claims Commission*

**Docket No. 302**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*,
as representatives of THE OTTAWA TRIBE,

**Docket No. 341-C**

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, and PETER BUCK,
*et al.*, members and representatives of members thereof,
*Plaintiffs,*

**Docket No. 29-D**

POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INC.,
*Intervenor,*

*v.*

THE UNITED STATES OF AMERICA,
*Defendant.*

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**Final Order Dismissing the Claims in Dockets 18-L and 341-C, and Severing Docket 89, and Interlocutory Order in Dockets 13-E, 27-E, 29-D, 133-A, 139, 202 and 302**

Upon the findings of fact, conclusions of law and opinion this day filed herein and which are hereby made a part of this order,

IT IS HEREBY ORDERED that the claims in Dockets 18-L and 341-C be, and the same are hereby, dismissed;

IT IS FURTHER ORDERED that Docket 89 be, and the same is hereby, severed from the consolidated proceedings herein; and

IT IS FURTHER ORDERED that the claims in Dockets 13-E, 27-E, 29-D, 133-A, 139, 202 and 302, proceed for the purpose of determining the acreage and fair market value as of July 4, 1805, of the lands ceded at the 1805 Treaty of Fort Industry, the consideration given for the cessions, and all other matters bearing upon the question of defendant's liability to the separate plaintiffs and intervenor.

Dated at Washington, D. C., this 4th day of April, 1973.

JOHN T. VANCE

John T. Vance, Commissioner

RICHARD W. YARBOROUGH

Richard W. Yarborough, Commissioner

MARGARET H. PIERCE

Margaret H. Pierce, Commissioner

BRANTLEY BLUE

Brantley Blue, Commissioner

## Appendix C

**Opinion of Indian Claims Commission Denying Motion for Rehearing. 31 Ind. Cl. Comm. 359**

BEFORE THE

INDIAN CLAIMS COMMISSION

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**Docket No. 13-E**

JAMES STRONG, *et al.*, as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,

**Docket No. 18-L**

RED LAKE BAND, *et al.*,

**Docket No. 27-E**

THE DELAWARE TRIBE OF INDIANS,

**Docket No. 29-D**

HANNAHVILLE INDIAN COMMUNITY, *et al.*,

**Docket No. 89**

THE SIX NATIONS, *et al.*,

**Docket No. 133-A**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*, as representatives of THE OTTAWA TRIBE,

**Docket No. 139**

LAWRENCE ZANE, *et al., ex rel.*, WYANDOT TRIBE, *et al.*,

**Docket No. 202**

ABSENTEE DELAWARE TRIBE OF OKLAHOMA, DELAWARE NATION, *ex rel.*, W. E. EXENDINE and MYRTLE HOLDER,

*Opinion of Indian Claims Commission Denying Motion*

**Docket No. 302**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*,
as representatives of THE OTTAWA TRIBE,

**Docket No. 341-C**

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, and PETER BUCK,
*et al.*, members and representatives of members thereof,
*Plaintiffs*,

**Docket No. 29-D**

POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INC.,
*Intervenor*,

**Docket No. 13-F**

JAMES STRONG, *et al.*, as the representatives and on behalf
of all members by blood of the CHIPPEWA TRIBE OF INDIANS,

**Docket No. 15-I**

THE POTTAWATOMIE TRIBE OF INDIANS, THE PRAIRIE BAND OF
THE POTTAWATOMIE TRIBE OF INDIANS, *et al.*,

**Docket No. 18-K**

RED LAKE BAND, *et al.*,

**Docket No. 27**

THE DELAWARE TRIBE OF INDIANS,

**Docket No. 29-G**

HANNAHVILLE INDIAN COMMUNITY, *et al.*,

**Docket No. 64-A**

SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, *et al.*,

*Opinion of Indian Claims Commission Denying Motion*

**Docket No. 89**

THE SIX NATIONS, *et al.*,

**Docket No. 133-C**

THE OTTAWA TRIBE, and GUY JENNISON, *et al.*,
as representatives of THE OTTAWA TRIBE,

**Docket No. 141**

LAWRENCE ZANE, *et al., ex rel.*, WYANDOT TRIBE, *et al.*,

**Docket No. 308**

CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, *et al.*,

**Docket No. 341-D**

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, and PETER BUCK,
*et al.*, members and representatives of members thereof,
*Plaintiffs,*

*v.*

THE UNITED STATES OF AMERICA,
*Defendant.*

Decided: September 19, 1973

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket 29-D and 29-G.

Rodney J. Edwards, Attorney for Plaintiffs in Dockets 18-K, 18-L, 139 and 141.

James R. Fitzharris, Attorney for Plaintiffs in Dockets 13-E, 13-F and 64-A.

Allan Hull, Attorney for Plaintiffs in Dockets 133-A, 133-C and 302.

Robert S. Johnson, Attorney for Plaintiffs in Docket 15-I.

Paul G. Reilly, Attorney for Plaintiffs in Dockets 89, 341-C and 341-D.

Louis L. Rochmes, Attorney for Plaintiffs in Dockets 27, 27-E, 202 and 308.

James M. Upton, with whom was Mr. Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

**Opinion on Motions for Rehearing in Dockets 341-C and 341-D**

Blue, Commissioner, delivered the opinion of the Commission.

On June 19, 1973, the plaintiffs in the above-captioned Dockets 341-C and 341-D, the Seneca Cayuga Tribe of Oklahoma, *et al.*, filed the following motions:

1) a motion for rehearing in Docket 341-D of the Commission's order entered in the case consolidated under the above-captioned Docket 13-F on May 23, 1973, at 30 Ind. Cl. Comm. 370-71, dismissing the plaintiffs' claim in said Docket 341-D; and

2) a motion for extension of time to file for rehearing in Docket 341-C of the Commission's order entered in the

cases consolidated under the above-captioned Docket 13-E on April 4, 1973, at 30 Ind. Cl. Comm. 37-38, dismissing the plaintiffs' claim in said Docket 341-C.

On July 5, 1973, the Commission entered an order, at 31 Ind. Cl. Comm. 11-12, in the case consolidated under the above-captioned Docket 13-E, denying the plaintiffs' motion under Docket 341-C for an extension of time to file for rehearing on the grounds that, as explained in said order, the motion was procedurally defective and unnecessary. At the same time the Commission ordered that the June 19, 1973, motion under Docket 341-C be deemed to constitute a motion for hearing under Docket 341-C filed as of July 5, 1973, and that the parties would have fifteen days from the date of the entry of the order to file responses to the motion for rehearing as is provided in Rule 33(c) of the Commission's General Rules of Procedure, 25 C.F.R. §503.33(c).

Responses in opposition to the motions for rehearing were filed on July 9, 1973, by the Chippewa plaintiffs in Dockets 13-E and 13-F, the Shawnee plaintiffs in Docket 64-A and the Wyandot plaintiffs in Dockets 139 and 141. The defendant responded in opposition on July 20, 1973.

The Seneca-Cayugas contend in these motions for rehearing that the findings of fact and conclusions of law upon which were based the orders dismissing both Dockets 341-C and 341-D were erroneous insofar as was found that the Indian who signed the Treaty of Greeneville, August 3, 1795, 7 Stat. 49, 54, as "Reyn-tue-co, (of the Six Nations, living at Sandusky)" signed with and as a representative of the Delawares and insofar as was concluded that the

predecessors of the Seneca-Cayuga Tribe of Oklahoma, *et al.*, were not signatories to the 1795 Treaty of Greeneville and acquired no rights thereunder. *See* Dockets 13-E, *et al.*, 30 Ind. Cl. Comm. 8, at 12, 27, 35, and Dockets 13-F, *et al.*, 30 Ind. Cl. Comm. 337, at 345, 359, 368.

The evidence submitted with the motions and relied upon to support the motions consists of a photostatic copy of the original handwritten 1795 Treaty of Greeneville and portions of the minutes of the treaty proceedings. The photostatic copy of the original handwritten treaty has not been introduced as evidence in either Dockets 13-E, *et al.*, consolidated or Dockets 13-F, *et al.*, consolidated, but is in evidence in other cases before the Commission; namely, Dockets 315, *et al.*, consolidated, as defendant's Exhibit No. A-602, and Dockets 13-G, *et al.*, consolidated, as defendant's Exhibit No. 538. Portions of the minutes of the 1795 Greeneville Treaty have been admitted into evidence in Dockets 13-E, *et al.*, consolidated, as defendant's Exhibit No. A-252, and in Dockets 13-F, *et al.*, consolidated, as defendant's Exhibit No. B-221. The complete minutes of the treaty are in evidence in Dockets 13-G, *et al.*, consolidated, as defendant's Exhibit No. 31. By the accompanying order and in connection with its consideration of these motions for rehearing, the Commission has, on its own motion, admitted into evidence in these proceedings the photostatic copy of the handwritten 1795 Greeneville Treaty (Def. Exh. A-602, Dockets 315, *et al.*) and the complete minutes of the Greeneville Treaty proceedings (Def. Exh. 31, Dockets 13-G, *et al.*).

The Seneca-Cayugas assert that this evidence demonstrates that the plaintiffs' predecessors in interest participated in the 1795 Greeneville Treaty and signed the same in their own right independent of the Delawares.

This contention on motion for rehearing would appear to be at variance with the prior stated position of the Seneca-Cayuga Tribe of Oklahoma, *et al.*, as it was set forth in said plaintiffs' proposed findings of fact, filed herein on March 2, 1970. There, plaintiffs proposed the following finding of fact:

RECOGNITION OF THE INDIAN TITLE

Finding 8

*The Greenville Treaty*

> All the tribes named in the cession treaties referred to above,* except the Senecas, were also named as parties to the treaty of Greenville concluded August 3, 1795. However the 'Six Nations of Sandusky' were present at the treaty proceedings and 'Reyn-tu-co, of the Six Nations living at Sandusky' signed the treaty. * * * The possession of this territory the United States guaranteed to the participating tribes. * * *

As evidence in support of this proposed finding the plaintiffs cited certain excerpts from the minutes of the proceedings at the 1795 Greeneville Treaty and the Statutes at

* These treaties are the treaty of July 4, 1805, 7 Stat. 87, under which Royce Areas 53 and 54, which were the subject of the claims in Dockets 13-E, *et al.*, consolidated, were ceded to the United States; and the Treaty of September 29, 1817, 7 Stat. 160, under which Royce Areas 87 and 88, which was the subject of the claims in Dockets 13-F, *et al.*, consolidated, were ceded to the United States.

Large version of the treaty itself, including specifically the signature page.

A difference does exist between the signature page of the handwritten copy of the 1795 Greeneville Treaty (Attachment A) and the signature page as printed in the Statutes at Large (Attachment B). In the Statutes at Large, published in 1846, the signature page, 7 Stat. at 54, reads, insofar as here pertinent, as follows:

*Delawares of Sandusky*

Haw-kin-pum-is-ka
Pey-a-mawk-sey
Reyn-tue-co, (of the Six Nations, living at Sandusky)

The Statutes at Large divided the remaining signers in the same manner; i.e., an italicized heading for the name of the tribe or group, followed by a list of the signers belonging to that tribe or group.

In the handwritten copy, the mark of each Indian appears in columnar form, and to the left of each mark is written the signer's name. Immediately to the left of the name is a vertical bracket which bracket encloses varying numbers of names included within the top and bottom arms of the bracket. The top and bottom arms of each bracket merge with the opposite arms of adjoining brackets to form one line. To the left of each bracket is written vertically the name of a tribe or group, thus indicating that each of the signers within a particular bracket were members of that tribe or group. Above and below the vertical name of each tribe or group is a double line.

Reyntueco made his mark at the bottom of the left-hand column of signers. There appears to be no dispute that he was the last Indian to sign the treaty. To the left of his mark is written "Reyn-tue-co (of the Six Nations living at Sandusky)". There is no bracket to the left of his name nor is there a tribal designation written vertically in the margin to the left of his name. Above his name enclosed by brackets are the marks and names of two Indians to the left of whose names is written vertically "Delawares of Sandusky." Below this vertically-written tribal designation is a double line. Reyntueco's is the only name on the signature page not bracketed with a tribal designation written in the margin next to it.

The Commission's decision that Reyntueco signed the 1795 Greeneville Treaty as a Delaware was based upon the version of the treaty printed in the Statutes at Large. The Commission has previously held, in the case cited in the instant motions for rehearing as one of those cases where the handwritten copy of the treaty was in evidence, that the "* * * Treaty of Greenville * * *, appeared to and was understood by the signatories as it now appears in the Statutes at Large." *See Peoria Tribe* v. *United States,* Dockets 99, *et al.,* 16 Ind. Cl. Comm. 574, 580 (1966). Furthermore, until the filing of these motions for rehearing the handwritten copy of the treaty was never introduced as evidence in these proceedings, nor did the Seneca-Cayugas seriously dispute the classification of Reyntueco as a Delaware signer based upon the Statutes at Large version of the treaty. The Seneca-Cayugas' assertion was limited to the fact that there were Six Nation Indians

(Mingoes) at the treaty proceedings (as the minutes of the treaty proceedings show) and that one of them apparently signed the treaty. However, the silence of the Seneca-Cayugas regarding the inclusion of Reyntueco with the Delawares of Sandusky on the signature page in the Statutes at Large was persuasive of their inability to refute the conclusion, reasonably to be drawn from the Statutes at Large version, that he signed the treaty as a Delaware.

We have considered the motions for rehearing and the evidence on which they are based and our conclusion is that the motions should be denied. The evidence so relied upon by the Seneca-Cayugas does not persuade us that a rehearing will serve any purpose in bringing to light any matters of which the Commission is not already apprised. The distinction in format between the signature pages will not, in light of the other evidence available to and considered by the Commission, support the proposition now urged in the motions for rehearing that Reyntueco signed, not as a Delaware, but rather as a representative of the Six Nations of Sandusky in their own right independent of the Delawares. Furthermore, references to the "Six Nations", "Six Nations of Sandusky" and "other Indians of Sandusky" in the minutes of the Greeneville Treaty proceedings do little to support plaintiffs' argument. The scattered references (Def. Exh. 31, Dockets 13-G, *et al.*, at 566, 567, 568, 570, 571, 575, 577 and 578) show at best that a few Six Nation Mingoes attended the treaty but the minutes taken as a whole show clearly that neither the Indians nor Wayne accorded them the status of contracting parties.

Our findings and conclusions previously entered with respect to the Seneca-Cayugas' predecessors were based upon the language of Greeneville Treaty, including the absence of any reference in the preamble or text thereof to the Six Nations or Mingoes. The treaty preamble recites those tribes considered contracting parties. At the conclusion of the text of the treaty it is specifically stated that it was "* * * the Sachems and War-Chiefs of the *before-mentioned* Nations and Tribes of Indians" (7 Stat. at 53; emphasis added) who signed the treaty.

In the case of *Sac and Fox Tribe* v. *United States*, 161 Ct. Cl. 189, 195 (1963), *cert. denied*, 375 U.S. 921 (1963) (*aff'g* Docket 83, 7 Ind. Cl. Comm. 675 (1959)), the Sac and Fox Tribe contended they were accorded recognized title to certain lands by virtue of the 1795 Greeneville Treaty. Although the instant case differs on its facts from the *Sac and Fox* case in that the Sacs and Foxes were admittedly not even present at the Greeneville Treaty proceedings, the following language of the Court in that case is, we believe, equally applicable as a statement of why we concluded here that the plaintiffs' predecessors were not contracting parties under the Greeneville Treaty. The Court there said:

> * * * Under its terms, only the named tribes were to be bound or benefited. The preamble recites that the federal representative met with the agents of 'the *said* tribes of Indians' (referring to the twelve signatory tribes) and agreed upon a treaty which, when ratified, was to be binding on the United States 'and the *said* Indian tribes' (emphasis added). The reconfirmed boundary was designated as the line 'be-

> tween the lands of the United States, and the lands of the *said* Indian tribes'; the ceded lands were given up by the '*said* Indian tribes; certain rights of passage for United States citizens were allowed by 'the *said* Indian tribes'; trade was to be opened with 'the *said* Indian tribes'; United States and 'the *said* Indian tribes' forbade private revenge or retaliation; and previous treaties between the United States and 'the *said* Indian tribes, or any of them' were to become void (emphasis added). The United States, as its major concession, relinquished territorial claims 'in consideration of the peace now established and of the cessions and relinquishments of lands made * * * by the *said* tribes of Indians'; and a payment was made 'to the *said* Indian tribes,' with specified annual allowances to be paid in the future to the twelve signatories by name (emphasis added).

Just as the Sacs and Foxes were not one of "said" tribes so neither, as the treaty language shows, were the plaintiffs' predecessors.

For all of these reasons, we believe that despite the differences in format between the handwritten and printed versions of the treaty, Reyntueco "of the Six Nations, living at Sandusky" signed the treaty, along with those other Sandusky Indians who signed immediately before him, as one of the "Delawares of Sandusky." We further continue to believe, for the reasons stated above, that the plaintiffs' predecessors were not signatories to the 1795 Greeneville Treaty.

The accompanying order therefore denies the motions by the Seneca-Cayugas for rehearing in Dockets 341-C and 341-D.

BRANTLEY BLUE

Brantley Blue, Commissioner

We Concur:

JEROME K. KUYKENDALL

Jerome K. Kuykendall, Chairman

JOHN T. VANCE

John T. Vance, Commissioner

RICHARD W. YARBOROUGH

Richard W. Yarborough, Commissioner

MARGARET H. PIERCE

Margaret H. Pierce, Commissioner

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**Attachment A**

(See Opposite ☞)

Francis.
Kee-aw-hah
Pig-a-mawk-sey

*Opinion of Indian Claims Commission Denying Motion*

**Attachment B**



*Chippewas.*

Mash-i-pi-nash-i-wish, (or Bad Bird)
Nah-sho-ga-she, (from lake Superior)
Ka-tha-wa-sung,
Ma-sass,
Ne-me-kass, (or little Thunder)
Pe-shaw-kay, (or Young Ox)
Nan-guey,
Mee-ne-doh-gee-sogh,
Pee-wan-she-me-nogh,
Wey-me-gwas,
Gob-mo-a-tick,

*Ottawa.*

Che-go-nickska, (an Ottawa from Sandusky)

*Putawatames of the River Saint Joseph.*

Thu-pe-ne-bu,
Naw-ac, (for himself and brother A-si-me-the)
Ne-na-se-ka,
Kee-sass, (or Sun)
Ka-ba-ma-saw, (for himself and brother Chi-sau-gan)
Sug-ga-nunk,
Wap-me-me, (or White Pigeon)
Wa-che-ness, (for himself and brother Pe-da-go-shok)
Wab-shi-caw-naw,
La Chasse,
Me-she-ge-the-nogh, (for himself and brother Wa-wa-sek)
Hin-go-swash,
A-ne-wa-saw,
Naw-budgh,
Mis-se-no-go-maw,
Wa-we-eg-she,
Thaw-me, (or le Blanc)
Gee-que, (for himself and brother She-win-se)

*Putawatames of Huron.*

O-ki-a,
Cha-mung,
Se-ga-ge-wan,
Na-naw-me, (for himself and brother A-gin)
Mar-chand,
We-na-me-ac,

*Miamis.*

Na-goh-quan-gogh, (or Le Gris)
Me-she-kun-nogh-quoh, (or Little Turtle)

*Miamis and Eel-River.*

Pee-jee-wa, (or Richard Ville)
Coch-ke-pogh-togh,

*Eel-River Tribe.*

Sha-me-kun--ne-sa, (or Soldier)

*Miamis.*

Wa-pa-man-gwa, (or the White Loon)

*Weea's, for themselves and the Piankashaws.*

A-ma-cun-sa, (or Little Beaver)
A-coo-la-tha, (or Little Fox)
Francis,

*Kickapoos and Kaskaskias.*

Kee-aw-hah,
Ne-migh-ka, (or Josey Renard)
Pai-kee-ka-nogh,

*Delawares of Sandusky.*

Haw-kin-pum-is-ka,
Pey-a-mawk-sey,
Reyn-tue-co, (of the Six Nations, living at Sandusky)

*Opinion of Indian Claims Commission Denying Motion*

In presence of, (the word "goods" in the 6th line of the 3d article; the word "before" in the 26th line of the 3d article; the words "five hundred" in the 10th line of the 4th article; and the word "Pinkashaw" in the 14th line of the 4th article, being first interlined.)

H. De Butts, first A. D. C. and Sec'y to M. G. Wayne, Wm. H. Harrison, Aid-de-camp to M. G. Wayne. T. Lewis, Aid-de-camp to M. G. Wayne, James O'Hara, Quarter-Master Genl. John Mills, Major of Infantry, and Adj. Genl. Caleb Swan, P. M. T. U. S. Geo. Demter, Lieut. Artillery. Vigo. P. fris La Fontaine. Ant. Lasselle. H. Lasselle. Jn. Beau Bien. David Jones, Chaplain U. S. L. Lewis Beufait. R. Lachambre. Jas. Pepen. Baties Coutien. P. Navarre.

*Sworn Interpreters.*

Wm. Wells. Jacques Lasselle. M. Morins. Bt. Sans Crainte. Christopher Miller. Robert Wilson. Abraham x Williams. Isaac x Zane.

To the Indian names are subjoined a mark and seal.

# Appendix D

## Excerpts from Treaty of Greenville, 7 Stat. 49, August 3, 1795

TREATY OF GREENVILLE, 7 Stat. 49, BETWEEN THE WYANDOT, DELAWARE, SHAWNEE, OTTAWA, CHIPPEWA, POTAWATOMI, MIAMI, EEL RIVER, WEA, KICKAPOO, PIANKESHAW AND KASKASKIA TRIBES OF INDIANS AND THE UNITED STATES OF AMERICA

GEORGE WASHINGTON

President of the United States of America

To All To Whom These Presents Shall Come, Greeting.

Whereas a Treaty of Peace and Friendship between the United States of America and the Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Potawatimes, Miamis, Eel River, Weea's, Kickapoos, Piankashaws, and Kaskaskias, was made and concluded on the Third day of August one thousand seven hundred and ninety five by Anthony Wayne, Major General Commanding the Army of the United States, duly authorized thereto, on the one part, and the Sachems and war chiefs of the before mentioned Nations and Tribes of Indians whose names are thereunto signed on the other part; which Treaty is in the form and words following viz:

### ARTICLE V

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that

relinquishment is this: The Indian tribes who have a right to these lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet and enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

## Appendix E

### Excerpts from Findings of Fact Submitted to the Commission on Behalf of Petitioner

Finding 10.

Seneca Use and Occupancy of Areas
53, 54, & 87 Prior to 1740

(a) Prior to 1700, the only tribes which appear to have any association with the areas of Northern Ohio were the Five Nations who had destroyed the Erie Indians who inhabited Northeastern Ohio and the surviving Eries were adopted or incorporated into the Five Nations.

(b) In the late seventeenth century, Cayuga Indians fished in the Guyahoga River and Seneca Indians traveled down the Ohio River.

(c) In 1701 and 1726 in treaties with the British the Five Nations or some of their members recited their conquests of the territory and included it in the description of their hunting grounds.

(d) No definitely documented villages can be located until the beginning of the period 1737 to 1759 when a group of Hurons (Wyandots) came from near Detroit in 1738 to "Sandoski" near which is present Castalia. After that date with the advent of the British and French traders and officials there is a growing record of use by native Indian groups predominantly the Iroquois, Delawares, Wyandots and Ottawas.

*Excerpts from Findings of Fact Submitted to Commission*

*Evidence:*

(a) D-X A 322, p. 2. "* * * by 1660 the Eries were among 'the different tribes whom [the Iroquois] have conquered' according to the Jesuit Father Jerome Lalement. Five Nations Iroquois policy—was to incorporate conquered peoples into the Iroquois population and 'the Requihronnons [Eries] who are the Cat Nation' were no exception."

(b) D-X B 10, p. 155. Lahontan in 1688 refers to "Bank of the River upon which the Goyogoans [Cayugas] were wont to fish for Sturgeon". The river was the Cuyahoga. LaSalle and Gelline met with the Senecas who told them of their trials down the Ohio. Kellogg, Early Narratives D-X A 54, p. 170, 188, 190.

(c) D-X A 16 p. 908-911
D-X A 38 pp. 799-801

(d) D-X A 322 pp. 35-36
D-X B 402 p. 10
D-X A 113 pp. 99-100
Findings #11 and 12 hereafter.

*Excerpts from Findings of Fact Submitted to Commission*

Finding 11.

Seneca Use and Occupancy
1740-1795

North and west of the Greenville Treaty line and within the State of Ohio, the ancestors of those Indians who now compose the Seneca Cayuga tribe lived, since a time prior to the American revolution and possessed and used in Indian fashion, either independently or in conjunction with particular tribes, certain portions of the ceded lands.

*Evidence:*

In 1743, Celeron reports "some Senecas, Onondagas and others of the Five Iroquois Village been seated themselves of late year at the White [Cuyahoga] River. D-X A 22.

In 1743, Navare reports "Ten different tribes settled upon that river [Cayahoga] making altogether about five or six hundred men, namely the Senecas, Cayugas, Oneidas, Onondagos, Mohican, Loups, Moraignans, Ottawas, Abenakis of St. Francis and the Sauteux.—The number of Indians who have settled on this river increases every day, since hunting there is abundant, while on the other hand at their former homes, there is no more game." SC-X—D-X A 70.

In 1743 Narvarre reports finding "of that nation [Ottawas of Detroit] five or six cabins who have asked the Iroquois Senecas for a small piece of land in order to light a little fire". D-X A 70 p. 318.

In 1745 a French trader at Sandusky relates "we lodged at the home of the great Sonontoin [Seneca]. D-X A 75.

*Excerpts from Findings of Fact Submitted to Commission*

In 1747 "The Irocois at the outlet of La Rivere Blanche". D-X A 74 p. 474.

In 1747 George Croghan refers to "a pair of ye Six Nations Ingans that has there dwelling on ye Borders of Lake Arey [Erie]. D-X A 73 p. 472.

Evans Map of 1755, D-X A 93, locates "Mingoes" on west bank of Cuyahoga 20-25 miles above mouth. D-X 322 p. 40.

In 1747 Joncaire reports "Hurons of Sandusky consider themselves Iroquois. Greater portion of their village children of Iroquois." D-X A 69 p. 146.

In 1748 the Hurons at Sandusky depart for "the White River to seek shelter among the Iroquois there". D-X A 69 p. 162.

In 1748 thirty Sandusky Warriors and their families were established near Kuskusky a series of 6-Nations Settlements on Beaver Creek. D-X A 233 p. 46, 47.

In 1751 Thomas Bourke, an English Trader at Cuyahoga says the country was within "the territory of the Five Nations which further extends divers leagues about it". D-X A 207, pp. 503, 504. D-X A 322 p. 54.

In 1755 "an Anonymous Draft of the Ohio from an Indian Account" (D-X B 100) legends in the area south of Lake Erie "Six Nations moved four years ago to Tuighsogrhruntie". D-X A 322 p. 57.

In 1755 Delery reports "Two cabins at Conchake one belonging to some Caughnawaga Mohawks and the other to some Five Nations Iroquois." D-X B 402, p. 14. D-X A 113.

He previously observed at Anioton "An angier [Mohawk] wintering three days march from this village

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arrived. He was going to Sandusky to trade". D-X A 113 p. 102, 103.

The Mitchell Map of 1755 legends the South Shore of Lake Erie "The Antient Eries were exterpated by the Iroquois upwards of 100 years ago, ever since which time they have been in possession of L. Erie" and Canahogue [Cayahoga] is described as "the seat of War, the Mart of Trade and chief Hunting Grounds of the Six Nations on the Lakes". D-X 351.

In 1756, James Smith who had been captured in Pennsylvania in 1755 was taken to Tullihas, on the "west branch of the Muskingum [about 15 miles south of Area 54] inhabited by Delawares, Saughnawagas and Mohicans. He was adopted into a Mohawk family and quickly learned to speak Mohawk. D-X B 55 pp. 175, 180, 186, 191.

The two chiefs at Tullihas were Tecanyerighto, "alias Pluggy" a warrior and Assallecoa "alias Mohawk Solomon". D-X A 322 p. 67. Each of these chiefs subsequently are identified with Mingo towns bearing their names. See 1775 reference to Pluggy's town below and D-X B 193 for Solomon's town.

During the four years of his stay with his Mohawk family, (1756-1759), Smith traveled on winter hunting trips with them on the major portion of areas 53, 54 and Eastern 87. D-X A 322 pp. 67-78, pp. 94-96. D-X B 73 p. 33.

In 1761 Sir William Johnson on his return from Detroit reports meeting "Aaron" and a party of Mohawks who told Sir William that he might go to "Sandusky" to "winter". Near Niagaria Johnson also met some Cayugas who "were going a-hunting to

Sandusky". D-X B 402 p. 42. D-X B 72 pp. 264, 267, 268.

In 1762 Aaron evidently wintered at Sandusky. D-X B 73 p. 33.

In 1765, Croghan reports 300 Wyandots, Mohicans and Caughnanaga Mohawk Warriors living in "villages near Sandusky with their hunting grounds on the head branches of the Scioto". D-X B 97, p. 2. D-X A 155. D-X A 156.

In 1767, Croghan at Sandusky met "a number of Wyandotts or Hurons with a number of Mohickons, Shawanase and Connewagoe Indians" who requested that traders "reside among them." D-X B 100 p. 36-37.

In 1769 Croghan noting a westward movement of Indian population out of western Pennsylvania and into the Ohio Valley reported a "Party of Ohio Senicas, Shawanese, and Delawares" had gone to Detroit and "requested of the Hurons to give their people some Lands near Quiyahaga [Cuyahoga] to Plant and Hunt and promised that they (the Ohio Senecas, Delawares and Shawnees) "would go and remove their people" from the Susquehanna River. D-X A 322 p. 139.

In 1770 Heckweder notes two "Mingo" or "Seneca" towns "Darby's Town" and "Hell Town". Darbys Town was on upper Sandusky River and Hell Town on the Clear Fork of Mohican River. D-X A 153 p. 72.

In 1775 Captain James Wood accompanied by Simon Gertz arrived "at the Seneca Town where we found Logan—with several of the Mingoes who had been prisoners at Fort Pitt". Dr. Vogelen identifies this town as "Sca Caium T" or "Scecaium" on the north bank of the upper Scioto River. D-X B 402 p. 58-59.

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In 1775, Col. Richard Butler accompanied by "Kyasota" (Kiasutha) a well known Allegany Seneca Chief —proceeded to Pluggy's Town at Mingo Village, 5 miles south of Area 87. D-X B 110 p. 7-15.

In 1776, William Wilson refers to "New Hell Town" on the Sandusky River 25 miles up from Upper Sandducky near present Bucyrus. D-X B 115 p. 2. D-X B 402 p. 60.

In 1778 there is reported the Mingo Town on the headwaters of the Great Miami River. Simon Kenton crossing the Scioto River six miles east of present Kenton, he met Logan the Mingo Chief at the latter's winter hunting camp. D-X B 109 p. 107. D-X B 108 pp. 103, 127-131.

In 1778 Mingoes were living at "the town situated between the two creeks—the little Scioto". D-X B 181 p. 450-451.

In 1783, Delaware Chief Thomas Armstrong of the Delawares had moved to "Hell Town" together with some Mingoes and Mohawks and established "Greentown" on the Black Fork of the Mohican River and it was referred to as a "Delaware and Mingo Town". D-X A 158, pp. 22-24. D-X A 191. D-X A 244.

In 1787 "Mingoes" or "Senecas" had agreed "to go to the mouth of Sandusky river to live and plant corn this spring". D-X 402 p. 121.

In 1787, Zeissberger refers to "two Mingoes—from Sandusky, where some dwell". D-X B 194 p. 369.

John Johnson, the Indian agent at Fort Wayne and Picqua relates that "at about the time of the American Revolution, five hundred Senecas by permission of the

Wyandots, located on the Sandusky river within the limits of what is now Seneca County Ohio". D-X 402 p. 121.

In 1788 two of General St. Clair's spies visited a "little Seneca Village called the Wasp's Town, between the two Sanduskys" Wasp's Town was near present Teffin. D-X B 256 p. 2, D-X 402 p. 122.

In 1791 Brickell, a Pennsylvania Captive was taken to a "Seneca town" which he said was "where Fort Seneca since stood". D-X B 226, p. 45-46.

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*Excerpts from Findings of Fact Submitted to Commission*

Finding 12.

*Seneca Use Subsequent to Greenville*

a. Subsequent to the Treaty of Greenville and up to and past treaty time, the Senecas continued to use the eastern portions of Area 53 in the Cuyahoga region and hunted throughout the northern half of the area in conjunction with the Ottawas and Wyandots. They continued to occupy and hunt in the western portion of Area 54 in conjunction with the Wyandots. They also continued residing in and hunting on the Sandusky and Scioto Rivers in conjunction with the Wyandots and resided in and hunted in the southwestern portion of Area 87 in conjunction with the Shawanee.

b. During the period 1805-1817 a substantial number of "Senecas" were living along the Sandusky River and in southwestern Area 87.

*Evidence:*

a. In 1796, Indians at Cuyahoga River "who had been west hunting" "these were Senecas" who lived at Grand River. D-X A 311.

In 1798 Tuscaroras camped at south end of Cuyahoga—Tuscarawas portage. D-X A 78 p. 291.

Judge Baar, a Cleveland historian, reports on the Indian pattern of use as follows "In the fall, the Senecas, Ottawas, Delawares and Chippewa resorted here [Cleveland] and—dispersed to hunt through the winter, on the Cuyahoga, the Grand River, Mahoning, Tuscarawas, Killbuck and Black Rivers. In the spring they returned with their furs and game and after trafficking away their stock, launch their bark canoes to

repair to Sandusky plains and the Miami prairies for the summer." D-X A 78, pp. 261-262. D-X A 315, pp. 1-5.

1798—Zeissberger and Mortimer note on Black River two miles from its mouth "a few families of Mohawks" who had lately "made a settlement". He had earlier noted a settlement of Onondagas near the mouth of Portage River. P-X A 269 p. 85. D-X B 233, pp. 78-79.

The presence of "Seneca" or "Chief Stigwanish", who was reported to have his home in Seneca County, Ohio, is frequently noted by surveyors and other visitors to the Cuyahoga area. They report meeting him at hunting camps or at his established settlement and orchard. D-X A 78 pp. 416-419, D-X A 315. D-X A 233 pp. 391-396.

1804—Br. Oppelt mentions "a certain Minque, Tawalos, who lives here at the [Huron] river".

1801-1803—The Mohawk settlement on Sandusky river is noted by the missionaries Hughs and Scott as being two miles below Lower Sandusky. Hughs also reports on the Seneca Town at present Fort Seneca. D-X B 318, pp. 2, 5, 6. D-X B 319, pp. 4-5.

In 1812, when the Senecas fled from the "Minque" town on the river to Upper Sandusky, they numbered 100 Warriors (400 persons). D-X B 366.

1813—General William Henry Harrison built his headquarters at Fort Seneca "at the Seneca Towns."

The treaty of July 22, 1814 (7 Stat. 118) in Article III recites "The Wyandot tribes and the Senecas of Sandusky and Stoney Creek,—"

b. 1815—Benjamin F. Stickney, Indian Agent, refers to the Mingoes then living at Stony Creek (Lewiston)

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as numbering about 600 persons. The Mingo had moved there in 1805 from present Mingo, Ohio, which is about 15 miles south of Area 87. D-X B 336, pp. 1-2. D-X B 385, 143a, 143c, 144a, 144d, B-X B 386, pp. 101-107.

"1815—Stickney reports there were about as many Senecas, Cayugas, Mohawks and Delawares combined as there were Wyandots" D-X B 402 p. 222.

1816—John Johnson, the Indian agent, gives the Sandusky Seneca population "on the Water of the Lands of Sandusky of Senecas (and they are increasing from New York) * * * 400". D-X B 324 p. 92. Later he raised it to "450". D-X B 340 p. 2.

In 1819, "Seneca Towns [on the] Sandusky River between Upper and Lower Sandusky" had a population of 348 Senecas.

In 1819 Johnson lists the population of Lewistown as 169 Shawnees and 203 Senecas.

Jeddediah Morses' Indian reports for 1820 at page 362 gives the following population:

| | |
|---|---|
| Wyandots | 542 |
| Shawnees (Lewiston) | 169 |
| Senecas (Lewiston) | 203 |
| Senecas (Sandusky) | 348 |

*Excerpts from Findings of Fact Submitted to Commission*

Finding 13.

*Continued Use of Area 87*

After the cession of 1805 the principal users of areas 53 and 54 to wit, Delawares, Senecas, Wyandots and Ottawas moved to and concentrated their numbers in the areas in which they had previously been established.

(a) The Delawares moved to the White River in Indiana and the other places to the west.

(b) The Senecas consolidated along the Sandusky River, in the headwaters of the Scioto River, and in the headwaters of the Miami River.

(c) The Wyandots continued to reside on and hunt along the Sandusky river and the upper reaches of the Blanchard River and probably within portions of Area 66.

(d) The Ottawas were by then concentrated on the lower portion of the Maumee river and in a village on the Blanchard River.

*Evidence:*

(a) Hodge, V. 1, p. 385

(b) Finding 12 above and see SC-X 51 and D-X B 403

(c) D-X B 403. D-X C 281

(d) O—X 511 and D-X B 403.

*Excerpts from Findings of Fact Submitted to Commission*

**Finding 14.**

*United States Recognition of Seneca Interest in Area 87*

(a) Lewis Cass and Duncan McArthur, the United States Commissioners who negotiated the treaty reported to the Secretary of War that the Wyandots, Senecas and Shawnees were the tribes who had rights in area 87 and their ancestors had "occupied it for generations".

(b) The Committee on Public Lands of the Senate in reporting the Treaty with amendments for approval by the Senate in analyzing the acreage obtained and the consideration paid referred to the Senecas "as co-partners of the Wyandots".

*Evidence:*

(a) "The Wyandots who owned it, and the Senecas and Shawnees who live upon it"—

"The ancestors of some of these Indians have occupied it for generations."—

"In fact the whole of the Wyandots, and all the Shawnees and Senecas in this quarter have made the last attempt to preserve the inheritance of customs and of lands transmitted to them by their ancestors." SC-X—AS-P 1 A II p. 138-139.

(b) "Tract ceded by the Wyandots 3,360,000

Regranted to the Chiefs in trust—12 miles square 92,160

| | |
|---|---|
| Add, one square Cranberry swamp | 640 |
| To individuals of the tribe, and adherents in sevaralty | 5,640 |
| To the Senecas, who made no cession, but are considered as co-partners with the Wyandots | 30,000 |

SC-X—AS-P 1 A II p. 148-150.

*Excerpts from Findings of Fact Submitted to Commission*

**Finding 15.**

***The Seneca Title***

a. The Senecas together with the Ottawas and Wyandots jointly had possession exclusive of other tribes in all of Area 53 which lies north of a line drawn approximately from the Cuyahoga-Tuscarawas portage dividing the streams flowing south and east into the Muskingum and its tributaries from the streams flowing north into Lake Erie or west into the Sandusky and Scioto rivers.

b. The Senecas jointly with the Wyandots had possession exclusive of other tribes in that portion of Area 54 lying West of the Black fork of the Mohican River.

c. The Senecas jointly with the Wyandots had possession, exclusive of other tribes, of all that portion of Area 87 which lies eastward of a line which proceeds from the mouth of the Portage river to Wood County and then south to the Greenville treaty line.

d. The Senecas jointly with the Shawnee had possession exclusive of other tribes of that portion of Area 87 as is embraced within Shelby, Logan, Hardin and Allen Counties as they existed in 1820.

*Evidence:*

Findings 5, 10, 11, 12, 13 and 14.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**Nos. 75-964 and 75-965**

SENECA-CAYUGA TRIBE OF OKLAHOMA, *et al.*,
*Petitioners,*

v.

THE UNITED STATES OF AMERICA,
*Respondent.*

## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS IN NOS. 75-964 AND 75-965

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Groups in Opposition

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-8537

IN THE

# Supreme Court of the United States

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THE UNITED STATES OF AMERICA,
*Respondent.*

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## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS IN NOS. 75-964 AND 75-965

---

## THE QUESTION

Did the Seneca Cayuga Tribe of Oklahoma or its antecedents, which were at one time part of the Six Nations of what is now New York State, have any interest, recognized or possessory, in any portion of (a) the lands ceded by the Treaty of July 4, 1805 at Fort Industry (7 Stat. 87) (Royce Areas 53 and 54 in northern Ohio westerly and southerly of Cleveland)(Petition No. 75-964), or (b) lands ceded by

the Treaty of September 29, 1817 at the Rapids of the Miami of Lake Erie (7 Stat. 160) (Royce Areas 87 and 88 in northwestern Ohio, southern Michigan and eastern Indiana southerly and westerly of Toledo) (Petition No. 75-965)?

## STATEMENT OF THE CASE

The issue is a complex question of fact and not a matter of law. As stated by the United States Court of Claims in both Appeal No. 3-74 and 4-74, both dated May 30, 1975:

> ". . . . the findings as made support the decision and order of the Commission and the same are supported by substantial evidence. We conclude further that there is no error of law in the decisions. . . ."

The question or questions presented here were substantively decided December 8, 1975, when petitions for writs of certiorari were denied by the Supreme Court in Nos. 75-389 and 75-438 and 75-458. Such petitions involved ten different sets of legal counsel and some sixteen tribes and/or groups of Indians. Said petitions related to the Treaty of Greenville of 1795 (7 Stat. 49). Said Treaty was not joined in by the Seneca-Cayuga or Six Nations, although it appears that "Reyntueco, (of the Six Nations, living at Sandusky,)" assented thereto by affixing his mark. The Indian Claims Commission exhaustively considered the matter in its opinion of September 19, 1973 (see pages 48a-49a and 50a-51a of appendices to petitioner's respective petitions). The Commission concluded:

> "For all of these reasons, we believe that despite the differences in format between the handwritten and printed versions of the treaty, Reyntueco 'of the Six Nations, living at Sandusky' signed the treaty, along with those other Sandusky Indians who signed immediately before him, as one of the 'Delawares of Sandusky.' We further continue to believe, for the reasons stated above, that the plaintiffs' predecessors were not signatories to the 1795 Greenville Treaty."

There have been many changes and regroupings of Indian tribes and groups. Proof of such is often difficult, and the petitioner has not carried the burden necessary in this case. In any event the Seneca-Cayuga and Six Nations were indigenous to New York State localities. Except for raids and sorties as far west as Minnesota in search of beaver pelts, they had no independent presence or proper claim to land areas essentially held, used and owned, in both the aboriginal and modern sense, by midwestern Indian tribes.

As the Court can see, the case at bar is essentially a dispute between Indian tribes or groups. It is not a dispute between the United States or the U.S. Department of Justice and Indians. It arises under the Indian Claims Commission Act of 1946, and relates to claims more than a century and a half old. Resolution of the

same should not be further delayed by pointless appeals and petitions.

Respectfully submitted,

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528 Main Street
New Canaan, Conn. 06840

*Attorney for*
Hannahville Indian Community,
Forest County Potawatomi Community,
Potawatomi Indians of Indiana and Michigan Incorporated.

February 7, 1976

SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

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JAMES STRONG, et al., including
SENECA CAYUGA TRIBE OF OKLAHOMA
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## JOINT MEMORANDUM OF WYANDOT TRIBE, SAGINAW CHIPPEWAS AND SHAWNEE TRIBE OPPOSING CERTIORARI

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*and*
*Counsel for Respondent Shawnee Tribe Petition No. 75-965*

February, 1976

Nos. 75–964 and 75–965

# In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES STRONG, et al., including
SENECA CAYUGA TRIBE OF OKLAHOMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions for a Writ of Certiorari
to the United States Court of Claims

## JOINT MEMORANDUM OF WYANDOT TRIBE, SAGINAW CHIPPEWAS AND SHAWNEE TRIBE OPPOSING CERTIORARI

Wyandot Tribe (Ind. Cl. Com. Docket 139) and Saginaw Chippewas (Ind. Cl. Com. Docket 13–E) are respondents in Petition No. 75–964 and are two of the five Indian tribes which the Indian Claims Commission determined held recognized title to an undivided one–fifth interest

each in Royce Areas 53 and 54, which were ceded to the United States by the Fort Industry Treaty of July 4, 1805 (Petition No. 75–964, 30 Ind. Cl. Comm. 8, 21–22, 35–36, Pet. App. B, 20a, 35a–36a). The Court of Claims affirmed this determination of the Commission (Pet. App. A, 1a–2a).

Wyandot Tribe (Ind. Cl. Com. Docket 141) and Shawnee Tribe (Ind. Cl. Com. Docket 64–A) are respondents in Petition No. 75–965 and two of the four Indian tribes which the Indian Claims Commission determined held recognized title to designated undivided fractional interest each in Royce Area 87, which was ceded to the United States by the treaty of September 29, 1817 (Petition No. 75–965, 30 Ind. Cl. Com. 337, 353–354, 368–369, Pet. App. B, 21a–22a, 37a–38a). The Court of Claims affirmed this determination of the Commission (Pet. App. A, 1a–2a).

The statements of petitioner was prepared in disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the Judgment rendered below.

The cases do not warrant the attention of the court. They were decided upon the determination of questions of fact applicable only to the instant parties to resolve a single controversy. The decisions below conflict with nothing and establish no precedents. The questions the petitioner would present were fully considered and fairly decided below, and none other than the parties are interested in or affected by the judgment.

Accordingly, the petitions for a writ of certiorari should be denied.

Respectively submitted,

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Tribe Petition No. 75–964 and
75–965

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Tribe Petition No. 75–965

February, 1976

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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NO. 75-964

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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NO. 75-965

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner[1] contends that the Indian Claims Commission and the Court of Claims erred in denying its claims for compensation based upon recognized title to land allegedly acquired by treaty with the United States and upon its non-exclusive possession of commonly used and occupied land.

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[1]Petitioners are the Seneca-Cayuga Tribe of Oklahoma and Peter Buck, *et al.*, suing in a representative capacity on behalf of members of the tribe. For convenience, all petitioners in these cases will hereafter be referred to simply as petitioner.

The Seneca-Cayuga Tribe of Oklahoma is the petitioner in each case. The two petitions for a writ of certiorari were filed simultaneously to seek review of orders of the Court of Claims denying, on similar grounds, petitioner's claims for compensation arising under two separate treaties (Pet. No. 75-964, p. 1; Pet. No. 75-965, p. 1). Each of those treaties concerned the cession to the United States of certain lands previously relinquished to the Indian tribe parties in the Treaty of Greeneville of August 3, 1795, 7 Stat. 49. A description of the relevant provisions of that treaty is contained in our Memorandum in Opposition to the petition for a writ of certiorari in *James Strong, et al.* v. *United States*, certiorari denied, No. 75-389, December 8, 1975.[2]

1. Petitioner in No. 75-964 is one of eleven Indian tribes whose overlapping claims to the lands ceded to the United States in the Treaty of Fort Industry of 1805, 7 Stat. 87, were consolidated for trial before the Indian Claims Commission. The Commission concluded that none of the claimants, including petitioner, had established aboriginal title to any portion of the ceded lands, over which no tribe maintained actual, exclusive and continuous use or occupancy "for a long time" prior to 1805 (Pet. No. 75-964 App. B, pp. 34a-35a). It further held that under the Treaty of Greeneville, various signatory tribes had recognized title to Royce Areas 53 and 54 (Pet. No. 75-964 App. B, pp. 14a-16a, 32a-36a), and awarded undivided one-fifth interests in those lands to the Delaware, Pottawatomie, Wyandot, Ottawa and Chippewa Tribes (Pet. No. 75-964 App. B, pp. 20a, 35a-36a). It also found that petitioner did not have recognized title to these lands because its predecessors in interest were not signatories of the Treaty of Greeneville and therefore acquired no rights in the lands therein relinquished by the

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[2]We are serving a copy of our memorandum in that case on petitioner's counsel.

United States (Pet. No. 75-964 App. B, pp. 10a, 12a, 15a-16a). Since only signatory tribes to the Treaty of Greeneville were accorded rights thereunder, *Sac and Fox Tribe* v. *United States*, 315 F.2d 896 (Ct. Cl.), certiorari denied, 375 U.S. 921, the Commission held that petitioner was not entitled to compensation for lands relinquished to the Indians in that Treaty but ceded back to the United States in 1805. It therefore dismissed petitioner's claim (Pet. No. 75-964 App. B, p. 35a), and denied its petition for rehearing (Pet. No. 75-964 App. C, pp. 40a-52a). On interlocutory appeal, the Court of Claims affirmed, one judge dissenting (Pet. No. 75-964 App. A, pp. 1a-3a).

Petitioner contends (Pet. No. 75-964, pp. 9-11) that its predecessors in interest were signatories of the Treaty of Greeneville, thereby entitling it to share in the compensation to be awarded for the later cession of those lands by the Indian tribes. Petitioner argues that one Reyntueco signed that treaty in a representative capacity on behalf of its ancestors, among other tribes, and that it therefore was a party to that Treaty, although its ancestors were not described as parties thereto in the preamble of the treaty (Pet. No. 75-964 App. C, p. 50a). But the Commission duly considered the capacity in which Reyntueco had signed the treaty and concluded that he did not represent petitioner's predecessors (Pet. No. 75-964 App. B, pp. 25a-26a, App. C, pp. 46a-51a). The Court of Claims implicitly affirmed this finding on appeal. In the absence of an exceptional showing of error, this Court should not consider petitioner's challenge to the sufficiency of the evidence on this factual issue. *E.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Radio Corp.* v. *United States*, 341 U.S. 412, 415.

Petitioner also contends (Pet. No. 75-964, pp. 3-4) that the Indian Claims Commission erred in holding that petitioner did not have aboriginal title to Royce Areas 53 and 54. Petitioner concedes (Pet. No. 75-964, p. 5) that its

ancestors did not enjoy exclusive use and occupancy of these lands,[3] but argues that the joint and amicable use of these lands by various Indians tribes constitutes a compensable interest under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, *et seq.*[4]

As we discussed in our Memorandum in Opposition in No. 75-389, the test of aboriginal title based on exclusive possession that was employed in this litigation has been repeatedly approved, both before and after enactment of the Act.[5] The Court of Claims properly refused to redefine that concept, which has been held to meet the purposes and objectives of the Act.

Aboriginal title is not an interest protected by the Fifth Amendment;[6] petitioner's right to compensation is statutory, deriving from the Indian Claims Commission Act. Most of the litigation arising under that Act has been concluded utilizing the rules applied by the Court of Claims

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[3]Petitioner argues (Pet. No. 75-964, p. 13) that the Commission ignored evidence it submitted in support of its proposed findings of fact concerning its predecessors' use and occupancy of the ceded lands. These proposed findings, however, are addressed solely to *joint* use and occupancy of the land. Petitioner made no claim of exclusive use and occupancy of any portions of Royce Areas 53 and 54.

[4]Under the exclusive possession theory, two or more tribes can nonetheless establish aboriginal title to an area if they shared the land in a close "joint and amicable" relationship. See *Sac and Fox Tribe* v. *United States*, 315 F. 2d 896, 903 n. 11 (Ct. Cl.), certiorari denied, 375 U.S. 921. However, petitioner does not contend that a close and intimate political and social confederacy sufficient to invoke this exception to the general rule existed among the tribes who occupied these lands.

[5]Memorandum for the United States Opposition, No. 75-389, p. 4.

[6]*Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

in this case. Petitioner has advanced no compelling arguments to show why the definition of joint occupancy sufficient to demonstrate aboriginal title should now be substantially broadened.[7]

2. In No. 75-965 petitioner challenges the finding of the Indian Claims Commission that under the Treaty of Greeneville, various tribes held recognized title to Royce Areas 87 and 88, as a result of which it awarded unequal, undivided interests in Royce Area 87 to the Wyandot, Ottawa, Shawnee and Delaware tribes (Pet. No. 75-965 App. B, pp. 36a, 37a-38a).[8] As in No. 75-964, the Commission held that petitioner did not have recognized title to these lands because Reyntueco did not sign the Treaty of Greeneville on behalf of its predecessors in interest and that they therefore acquired no rights under that treaty (Pet. No. 75-965 App. B, pp. 13a-14a). Accordingly, the Commission dismissed petitioner's claim (Pet. No. 75-965 App. B, p. 37a), and denied its petition for rehearing (Pet. No. 75-965 App. C, pp. 42a-54a). On interlocutory appeal, the Court of Claims affirmed, one judge dissenting (Pet. No. 75-965 App. A, pp. 1a-2a).

Petitioner's contention (Pet. No. 75-965, pp. 9-11) that the Indian Claims Commission incorrectly determined that its predecessors in interest were not signatories of, and acquired no rights under, the Treaty of Greeneville is identical to its claim in No. 75-964 (Pet. No. 75-965, p. 12), which we have addressed at pp. 2-3, *supra*.

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[7] This Court has denied review this Term in two other cases that presented identical issues. *James Strong, et al.* v. *United States*, *supra*; *Pottawatomie Tribe of Indians, etc.* v. *United States*, certiorari denied, No. 75-438, December 8, 1975.

[8] The Commission also awarded equal, undivided interests in Royce Area 88 to the Chippewa, Ottawa and Pottawatomie Tribes (Pet. No. 75-965 App. B, p. 38a). The Commission's decision with respect to Royce Area 88 is not challenged, since petitioner asserted no claim to those lands (Pet. No. 75-965, p. 7).

Petitioner also contends (Pet. No. 75-965, pp. 3-4) that the court below erred in failing to award it aboriginal title to portions of Royce Area 87, even though it concedes (Pet. No. 75-965, p. 5) that use and occupancy of that land was not exclusive. But the Commission concluded that none of the various claimants held aboriginal title to any portion of Royce Area 87 because no tribe had proved that it maintained exclusive use and occupancy of a definable portion of that land "for a long time" prior to the 1817 cession (Pet. No. 75-965 App. B, pp. 13a-14a). Petitioner does not challenge the application of this well-settled principle to these lands but here suggests as it did in No. 75-964, that this Court formulate a new rule of aboriginal title. The reasons why the present definition of joint occupancy sufficient to demonstrate aboriginal title should not be substantially broadened are set forth at pp. 3-5, *supra*.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

MARCH 1976.